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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD A. SPRAGUE,

Appellant

v.

GREG WALTER, KENT POLLOCK, HOWARD SHAPIRO, EUGENE L. ROBERTS, JR., CREED C. BLACK, MICHAEL PAKENHOM, AARON EPSTEIN, and PHILADELPHIA NEWSPAPER, INC., and KNIGHT NEWSPAPERS, INC.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

James E. Beasley
William P. Murphy
BEASLEY, CASEY, COLLERAN, ERBSTEIN
THISTLE, KLINE & MURPHY
21 South 12th Street
Philadelphia, PA 19107-3683
(215) 665-1000

Counsel for Appellant

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

Whether the Pennsylvania Shield Law, 42 Pa. C.S.A. Section 5942, as applied, violates the Fourteenth Amendment in that it denies a libel plaintiff any opportunity to cross-examine a reporter who testifies that he is without "actual malice" because he merely published information from an undisclosed source, where the identity, reliability and existence of the source are themselves secluded from any and all verification or examination.

Whether the Pennsylvania Shield Law, as applied, violates federal due process because in addition to the nearly impossible federal burdens placed on a public libel plaintiff it also denies cross-examination on the issue of actual malice and therefore destroys the plaintiff's federally protected property interest in reputation.

PARTIES TO PROCEEDING

The parties to the proceeding below are Richard A. Sprague and Philadelphia Newspapers, Inc. Several individual reporters and editors were by stipulation deemed parties for purposes of trial rulings, but are not parties for other purposes. They are Greg Walter, Kent Pollock, Howard Shapiro, Eugene L. Roberts, Jr., Creed C. Black, Michael Packenham, and Aaron Epstein.

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JURISDICTIONAL STATEMENT

REFERENCE TO OPINION BELOW

The Opinion of the Pennsylvania Supreme Court is reported at 543 A.2d 1078 (Pa. 1988). The Opinion of the Pennsylvania Superior Court is reported at 357 Pa.Super. 570, 516 A.2d 706 (1987).

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The proceeding below was an appeal to the Pennsylvania Supreme Court from a judgment of the Pennsylvania Superior

Court reversing a libel verdict principally on the basis of the Pennsylvania Shield Law, 42 Pa.C.S.A. Section 5942 (a). In that appeal, the Appellant herein challenged the constitutionality of the Shield Law, *inter alia*, on federal constitutional grounds including those suggested but not addressed by this Court in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). The Supreme Court of Pennsylvania thereupon interpreted and applied the Shield Law in such a way as to reject the Appellant's federal constitutional challenge and make the violation of due process on retrial a certainty.

2. The date of the order of the Pennsylvania Supreme Court presented for review is May 31, 1988. Appellant's Application for Reargument was denied on July 7, 1988.

3. Appeal jurisdiction is conferred upon this Honorable Court by 28 U.S.C. Section 1257(2). The statute being challenged on federal constitutional grounds is the Pennsylvania Shield Law, 42 Pa.C.S.A. Section 5942 (a).

STATUTES INVOLVED

Fourteenth Amendment, U.S. Const.
Pennsylvania Shield Law, 42 Pa.C.S.A. Sec. 5942.
[Reproduced in Appendix]

STATEMENT OF THE CASE

In 1986, this Honorable Court issued a landmark ruling in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), reversing the Pennsylvania Supreme Court for placing the burden of proving truth upon the libel defendant in a private plaintiff case. In the course of assessing the factors which played a part in that constitutional decision, this Court also referred to the potential influence of the Pennsylvania Shield Law itself. The Court stated:

> We recognize that *the plaintiff's burden in this case is weightier because of Pennsylvania's "shield" law*, which allows employees of the media to refuse to divulge their sources. [Citation and footnote omitted.] But we do not have before us here the question of the permissible reach of

> such laws. Indeed, we do not even know the precise reach of Pennsylvania's statute. The trial judge refused to give any instructions to the jury as to whether it could, or should, draw an inference adverse to the defendant from the defendant's decision to use the shield law rather than to present affirmative evidence of the truthfulness of some of the sources. [Citation and footnote omitted.] That decision of the trial judge was not addressed by Pennsylvania's highest court, nor was it appealed to this Court. *In the situation before us, we are unconvinced that the State's shield law requires a different constitutional standard than would prevail in the absence of such a law.*

Id. at 779 (emphasis added). This case now supplies the "situation" raising the very constitutional issue averted in *Hepps*.

In 1973, the *Philadelphia Inquirer*, a newspaper published by Philadelphia Newspapers, Inc. ["hereinafter" referred to as PNI], published a series of defamatory articles about a former First Assistant District Attorney, Richard A. Sprague. The early articles falsely accused Mr. Sprague of being involved in an illegal wiretapping scheme. They reached their crescendo on April 1, 1973, with a front page story in the Sunday edition accusing Mr. Sprague of quashing a murder case involving a friend's son ten years earlier. The headline read:

Did Sprague Quash Homicide Case as Favor to Urella?

The subtitle of this "case-quashing" story deviously incorporated the previous theme of wiretapping:

Sprague, Urella Tied to Wiretap, Homicide Case

The article was authored by a reporter named Kent Pollock, following what was described in the byline as an "extensive investigation" by both Greg Walter, another reporter and central figure in this case, and Pollock himself.

The history of this case is tied to the history of Greg Walter, the real architect of the malicious defamation. Walter had been a reporter for the Philadelphia *Evening Bulletin* in 1972 when he

was arrested for recording a telephone conversation without permission. Then District Attorney Arlen Specter determined that prosecution was necessary. Walter was officially charged with illegal wiretapping. Specter assigned Richard Sprague, the office's top trial attorney, to handle the matter. Walter was thereupon prosecuted and ultimately convicted in Municipal Court.

As a result of the incident, Walter lost his job with the *Bulletin* and sank into a state of depression. The *Inquirer,* the *Bulletin's* chief competition in Philadelphia, saw the wiretapping conviction of a reporter as a cause celebre and published dozens of articles and editorials portraying Walter as the victim of an injustice. Kent Pollock hinself authored many of the articles defending Walter. The charge was eventually dismissed on appeal.

In December of 1972, however, while Walter's wiretapping conviction was pending on appeal, the *Inquirer* hired Greg Walter as an investigative reporter. Walter then joined none other than Kent Pollock. As a team they promptly began "investigating" Richard Sprague. This "investigation" culminated in the articles described above.

The evidence at trial was quite explicit in showing Walter's hatred of Sprague. Walter's former girlfriend testified that Walter was "out to get" Sprague and that it "stuck in his craw that Mr. Sprague had been able to do that." Even Pollock testified at trial that Walter had said of Sprague, "The son of a bitch shouldn't have prosecuted me."

The plaintiff's evidence of Walter's personal vendetta in conjunction with evidence of obvious distortions and known falsifications of facts in the articles were found to satisfy the requirements of "actual malice" under *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). The defendant's motion for a directed verdict was, therefore, denied. Notably, the plaintiff proved this *prima facie* case of actual malice even though the Pennsylvania Shield Law prevented the discovery of the identities of "confidential sources" for statements in the articles. Among the unidentified "sources" was someone who allegedly said that Sprague had been in close touch with Urella, a State

Police Captain, during a wiretapping controversy which involved Urella. This was the wiretapping controversy which the reporters used to concoct a partnership between Sprague and Urella in nefarious activity.

After the plaintiff succeeded in overcoming both the monumental *Times* hurdle and the defendant's blockade of source identities, he was then confronted with another twist designed to reduce a public plaintiff's chances of success in a libel case to zero. PNI called Kent Pollock to the stand to testify that there were confidential sources who told either him or Greg Walter some of the facts related in the articles in suit. Pollock was asked by PNI's attorney for information which allegedly came from a source whose identity had been steadfastly withheld during discovery. The unnamed source who was now being summoned to trial in phantom form by the defendant newspaper had at all times been, and continued to be, completely unavailable to Mr. Sprague. In eliciting from the mouth of its reporter Kent Pollock information supposedly given by unnamed third persons, PNI sought to persuade the jury that it had reliable support for aspects of its story and therefore had not been guilty of "actual malice." This effort to persuade, however, was unaccompanied by any opportunity for effective inquiry into the existence, worth, or credibility of the purported source itself or the source's purported information.

The denial of the right to cross-examine inherent in the defendant PNI's approach was so pronounced that even the its own counsel conceded to the trial court that allowing reporters to testify about the information allegedly received from indisclosed sources would "not permit effective cross-examination, because he can't check it out." The record of the denial of an opportunity for fair cross-examination as a result of the Shield Law's ultimate application is thus presented as clearly as could ever be expected, so clearly indeed that it resulted in this major concession by counsel for the media defendant.

There is one other aspect of the defendant PNI's strategy to call Pollock to tell about his and the absent Greg Walter's sources. Walter was unavailable at trial although the evidence positively showed that he was the mastermind of the effort to

"get" Richard Sprague. PNI claimed that Walter was too ill to testify. After the plaintiff's case closed, Walter cast doubt on this assertion by working as a reporter and traveling within the state on assignments. When the plaintiff subpoenaed Walter to appear in the courtroom during the defense portion of the case, he appeared. PNI chose not to call him, however, and declined an opportunity to prove his medical disability to the jury.[1]

The trial court, in addressing these weighty issues, pursued a Solomon-like course. Because PNI plunged into this area by introducing confidential information as a sword for the defense, its reporters were bound to make a choice: either reveal the source's identity, and thus permit cross-examination on the defense issues of verification and responsibility, *or* be barred from relating the alleged information as an affirmative defense. The court's order thus solved the cross-examination dilemma conservatively without a contempt citation, without any adverse inference from the refusal to identify a source, and without unconditionally compelling the identification of any source.

The trial proceeded to a verdict for the plaintiff in the amount of $3 million in compensatory damages and $1.5 million in punitive damages. PNI appealed to the Pennsylvania Superior Court on the principal ground that the trial court's order violated the Shield Law. That Court reversed and ordered a new trial. The Superior Court interpreted the Shield Law to permit the defendant to handpick a reporter to say what unnamed sources had told him or a co-reporter. The Superior Court somehow reasoned that the reporter on the stand could be effectively cross-examined even though he would never be required to reveal the very details which would lead someone to question whether the source was either obviously unreliable or perhaps spun from whole cloth. The Superior Court did not accept the plaintiff's substantial arguments that such acquiescence on the part of the court would in effect invite the

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1. The Pennsylvania Supreme Court ruled that it was also an error for the trial court to have allowed an adverse inference against the defendant for failing to call Walter because the medical testimony should have been heard by the court.

invention of sources by blocking all of the traditional devices known to Anglo-Saxon jurisprudence for inquiring into and verifying facts in the crucible of a trial. The jury, in turn, was left to speculate whether the *reporter* could be believed about a matter on which the reporter had the final, unverifiable and unexaminable word – the character of his alleged source.

The Pennsylvania Supreme Court thereafter granted Sprague's Petition for Allowance of Appeal. That Petition raised, *inter alia,* the question whether the Superior Court's application of the Shield Law violated the fourteenth amendment of the United States Constitution. On May 31, 1988, the Pennsylvania Supreme Court issued an Opinion which explained that "[r]eview was granted because the issues herein implicate the relationship between the federal and state constitutional provision relating to free speech and reputation including the statutorily created privilege conferred upon a media defendant, commonly known as the 'Shield Law'." Appendix at 3. After superficially criticizing the breadth of the Superior Court's ruling, the Court gave a nearly clonal resolution of the problem which still allowed the use of the Shield Law as a sword at trial.

The Supreme Court articulately framed its decision as follows:

> Witness Pollock was offered to show that the defamatory statements in the articles he participated in were not recklessly made without regard to the truth of the assertations contained therein. After testifying as to his experience as a reporter up to the time of the publishing of the articles in question, he was permitted, over objection by plaintiff's counsel, to describe the ongoing investigation from which the defamatory statements against the plaintiff arose. Pollock then proceeded to articulate various pieces of information he had received from unidentified sources which formed the basis for the statements made in the challenged articles. The trial court ultimately ruled that, if the defendant failed to disclose the sources of this information, it would be precluded from defending on the grounds of any information supplied by these unidentified sources. We

> note that the trial court in a very difficult and complex area attempted to adjust competing interests in a fair and judicious manner. The difficulty arose from the prevailing uncertainty as to the proper application of our Shield Law in the context of present defamation law. Nevertheless, we are constrained to agree with the Superior Court that the ruling was erroneous and that the error requires the grant of a new trial. [Appendix at 15-16.]

The Court then gave a holding which, although it purported to be different from the Superior Court's decision, actually reinforced the denial of cross-examination and the corresponding invitation to the jury to guess about something they knew nothing of — the unidentified source's true reliability:

> [T]he trial court in its instructions should make clear for the jury, (a) that the burden of proof remains upon the plaintiff throughout the trial; (b) that, if the Shield Law is invoked by the defendant to avoid disclosing a source, *no inference either favorable or adverse may be drawn from the act of invoking that privilege as to the reliability of the unidentified source or as to the accuracy of the information supplied;* and (c) that the jury is to consider any evidence and/or arguments made by plaintiff and defendant as to the reliability of the undisclosed source and as to the accuracy of the information supplied. [(Appendix at 17 (emphasis in original; footnote omitted).]

The Pennsylvania Supreme Court's resolution of the Shield Law issue, while stated to be far less injurious to the interests of libel plaintiffs than the Superior Court's Opinion which it criticized, was in fact an adoption of the Superior Court's view. The thrust of the Pennsylvania Supreme Court's decision and, now, the law of Pennsylvania is to deny the right to cross-examine a witness on the identities of "sources" even though the media defendant undertakes to prove in defense that it acted responsibility in quoting them. The idea that the deprivation of cross-examination can be cured by a mere opportunity to "argue" that the sources are unreliable is a feckless one, to say

the least. The refusal to identify a source creates an evidentiary blackout. During that blackout, a reporter is permitted to describe the "source" in ways which favor its reliability. The jury, however, is given no true evidence to support such a flattering view. The plaintiff's attorney may not even argue that the "source" cannot be believed either because it does not exist or because, if revealed, it would prove unreliable.

The issue of a source's reliability and the reliability of his purported information is, based on the Pennsylvania Shield Law as applied, left for a fact finding without a fact. Because "no inference either favorable or adverse may be drawn from the act of invoking [the Shield Law] privilege as to the reliability of the unidentified source or as to the accuracy of the information supplied," a libel plaintiff's attorney apparently cannot even attack the source's credibility on the ground that the media defendant refuses to produce him. Appendix at 17. The jury is thus left in a state of utter stupefaction like that produced in Plato's caves where only shadows could be seen. In this instance, however, the shadows have achieved judicial blessing as evidence.

The Supreme Court of Pennsylvania ordered that this case be remanded for retrial in order to allow the defendant to put on all of its confidential source information to show that it had a verifiable and responsible basis for its statements. The plaintiff, in turn, is disabled from either making any rational response based on evidence or challenging the use of the privilege itself as inherently suspicious. Reporters are thus served notice that the outright manufacture of "source" information can be piled atop the extraordinary federal burdens already heaped upon the libel plaintiff and can be used to defeat proof of actual malice without any fear of evidentiary contradiction or, worse still, without any fear of the discovery of possible fraud or perjury.

The reach of the Pennsylvania Shield Law in a trial setting is now known. This Honorable Court's recognition that a "plaintiff's burden . . . is weightier because of Pennsylvania's 'shield' law" is a palpable fact. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 (1986). That weight, moreover, has proven to be a truly crushing one which crumbles even the most

solid pillars of due process — the right of cross-examination; the right to have fact findings based on evidence, not conjecture; and the right to have the effective and meaningful assistance of an attorney who may argue from the *evidence* and not be forced to argue a factual issue in an evidentiary vacuum.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. *The Pennsylvania Shield Law, As Applied, Violates Federal Due Process Because in Addition in the Nearly Impossible Federal Burdens Placed Upon a Public Plaintiff, that Statute Denies the Plaintiff a Right of Cross-Examination on Matters Pertaining to "Actual Malice" and Permits a Rebuttal to Proof of Actual Malice Without Evidence.*

Although this Court continues to apply the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), it has not since *Coughlin v. Westinghouse Broadcasting*, 476 U.S. 1187 (1986), been confronted with a challenge to that standard itself. Moreover, this Court has never before been squarely confronted with the problem so potently demonstrated in this case of compounding the *Times*-related burdens with a denial of the right of cross-examination whenever a media defendant testifies that its story was based on an undisclosed source protected by a state's Shield Law. This compelling issue was avoided in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), a case in which this Court cogently observed that the application of the Pennsylvania Shield Law made a libel plaintiff's burden weightier.

It requires little effort to find proof that of the burden presented by the "actual malice" standard in public plaintiff libel cases is enormous. The concurring opinion of Justice White in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), described the *Times* standard as "severe overkill" and "escalating the plaintiff's burden of proof to an almost impossible level." *Id.* at 771. Justice White explained lucidly that:

> The New York Times rule . . . countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and, second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

472 U.S. at 769; *accord, id.* at 764 (Burger, C.J., concurring). Although *Times* came into being to provide healthy breathing space in the event a reporter or newspaper inadvertently crossed the line of falsehood in contributing to public debate, the actual malice standard has in practice grown out of all proportion to that original purpose. It is now rare indeed that any case will be found to satisfy the *Times* threshold.

As stated by Judge Edward Becker, concurring in *Coughlin v Westinghouse Broadcasting Co.*, 780 F.2d 349 (3d Cir.), *cert. denied,* 476 U.S. 1187 (1986):

> [T]he *New York Times* standard makes it hard enough for a public figure to win a libel suit, even when faced as here, with what any fair observer must agree is egregious conduct on the part of the media.

It is precisely a recognition of that unfortunate reality that led former Chief Justice Berger to say in *Coughlin* he "would grant certiorari and set this case for argument to determine whether the Court's 'mandate' [in *Times*] remains an appropriate one." 476 U.S. at 1188.

The present case relies upon this history of uncertainty about the scope of *Times* in order to present a somewhat narrower issue which arises in light of that nearly impossible burden – whether federal due process permits a state to so compound the existing *Times* burdens as to make a libel suit virtually nonactionable, even in a state which constitutionally vests in its citizens a fundamental right of reputation and a right of access to judicial recourse for its breach. *See Hatchard v.*

Westinghouse Broadcasting Co., 516 Pa. 184, 532 A.2d 346 (1987). It is the existence of overwhelming federal constitutional pressures on a public plaintiff libel action which makes so critical the additional denial of the right to cross-examine a media defendant about hidden sources whom it insists upon quoting before a jury in order to disprove a case of actual malice. Because *Times* itself precipitated the crisis presented by the application of the Pennsylvania Shield law at issue here, there is a heightened need for a definitive federal response.

Although, as argued below, the application given to the Pennsylvania Shield Law in this case would even without *Times* represent a breach of federal due process, the pressure of the additional federal burdens literally locks the door on this and other public plaintiffs. In deference to the cold and hard reality, the Superior Court of Pennsylvania in applying all the restrictions which choke a libel plaintiff's suit recently observed:

> As it stands now, the law holds that a plaintiff can recover in a media libel suit if he can prove that the defamer spoke with actual knowledge that the words were false or with reckless disregard of whether the words were false. This is a difficult task for the plaintiff, to say the least, but when the law holds that the defamer has a right to be wrong, has a right to be negligent in ascertaining the truth, has a right to carry ill will against the defamed, has a right not to be fair, *and has a right to speak from undisclosed sources,* the burden for the plaintiff becomes almost too heavy to carry.

Curran v. Philadelphia Newspapers, Inc., Slip Op. at 28-29, No. 2426 Phila. Dkt. 1987, 1988 (Pa. Super., July 1, 1988). The Court's use of the word "almost" in this setting was a wry kindness to the existing law of defamation, for *Curran* also held that if the plaintiff calls a defendant reporter to the stand his disclaimers of actual malice will often be *conclusive. Id.*, Slip Op. at 19 n.11. The addition of the Shield Law ruling of the Supreme Court of Pennsylvania is a promise that Richard Sprague will be denied the right of cross-examination on remand and will therefore be foreclosed from any relief whatsoever.

B. *Applying the Pennsylvania Shield Law to Permit a Media Defendant to Testify About Information From an Undisclosed Source for the Purpose of Disproving Actual Malice Constitutes a Deprivation of Due Process in that it Denies the Plaintiff Any Right to Cross-Examine on the Reliability of the Source Who, if One Exists at all, Remains Hidden From View.*

In *Greenberg v. CBS, Inc.*, 69 A.D.2d 693, 419 N.Y.S.2d 988, 996 (1979), the New York Appellate Division confronted "one of the broadest [Shield Laws] in the country, protecting both identity and information and vesting the media with the option to disclose or refuse to disclose." In presenting the issue of the use by a media defendant at trial of information from undisclosed sources, the Court in *Greenberg* observed that the

> defendants rely on undisclosed sources and information for verification and offer *this* verification as "proof" of their responsibility. Thus they have put in issue the very privilege upon which they rely. They are using the "Shield Law" affirmatively as a sword to prevent challenge by the plaintiff.

419 N.Y.S.2d at 996-97. Fully cognizant of the broad shield law protections in effect in New York, the media capital of the nation, the *Greenberg* Court still recognized that permitting such an impenetrable defense, even in a private plaintiff setting not burdened by the stiff *New York Times* malice standard, would be a perversion of the process of justice and would infringe the constitutional right of cross-examination. The Court stated:

> Such exploitation of the statute vitiates the limited right to recovery that the plaintiff has as a private individual, and should not be permitted (see *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A.2d 473). This purpose was not intended by the legislature nor is such a use mandated by the First Amendment (see *Carey v. Hume*, 160 U.S.App.D.C. 365, 492 F.2d 631, pet. for cert.dsmd. 417 U.S. 938 . . ., *Garland v. Torre*, 259 F.2d 545, cert. den. 358 U.S. 910

> . . .) "A construction of the statute permitting the deprivation of a party's right of cross-examination on vital issues of his cause of action could create constitutional difficulty or infirmity." (*Brogan, supra,* 22 N.J. at p. 254, 123 A.2d at p. 481). . . .
>
> "Evidentiary privileges in litigation are not favored and even those rooted in the Constitution must give way in proper circumstances" (*Herbert v. Lando,* . . . 99 S.t. 1635, 1648 . . ., Supra). . . . [T]he fair solution, one which does not attenuate the policy consideration of the statute, is to allow the defendants to elect the future course of their defense. At trial, if the defendants opt to rely on their statutory privilege, they should be precluded from any use of those sources and information as proof of verification or evidence of responsibility. On the other hand, if they choose to fully disclose their investigation, no limitation of the defense will occur.

419 N.Y.S.2d at 996-97 (emphasis added).

The Supreme Court of Pennsylvania rejected the *Greenberg* approach in interpreting the Pennsylvania Shield Law. Instead, it embraced the "deprivation of a party's right of cross-examination on vital issues of his cause of action."[2]

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2. The *Greenberg* decision had been embraced and approved by the federal district court in *Mazzella v. Philadelphia Newspapers, Inc.,* 479 F.Supp. 523 (E.D.N.Y. 1979), a case construing the Pennsylvania Shield Law. In *Mazzella* the district court upheld the newspaper's right to withhold sources during pretrial discovery, just as the trial court did in this case. It explained, however, the conditional nature of the ruling:

> This holding . . . is accompanied by the following caveat. Since the function of all trials is to establish the truth, and since our decision in this case is predicated upon the assumption that the Pennsylvania Shield Law was enacted primarily to protect confidential communications, defendants shall be deemed to have waived the law's protections should they choose to prove their defense through witnesses whose identities are protected from disclosure by this order.

Id. at 529 n.3. The *Mazzella* court, pressing somewhat further than *Greenberg,* recognized that even a decision by the defendant newspaper to call a confidential source as a witness at a trial (and thus subject him or her to open

The United States District Court for the District of Nevada also recognized and avoided the constitutional flaw in the Pennsylvania Supreme Court's application of the Pennsylvania Shield Law. In *Laxalt v. McClatchy,* 116 F.R.D. 438 (D. Nev. 1987), the United States District Court made exactly the same ruling as did the trial court in this case. It flatly precluded defendants from using source information at trial unless they first revealed their sources:

> If the defendants were allowed to base their defense in this case, as they have done, on the reliability of their sources, and yet still be allowed to refuse to disclose what those sources are, the jury would be left without the crucial information it requires to make its decision. *See Brogan v. Passaic Daily News,* 22 N.J. 139, 123 A.2d 473, 480 (1956), *overruled on other grounds, Meressa v. New Jersey Monthly,* 89 N.J. 176, 445 A.2d 376 (1982). (Footnote omitted). The defendants could then give whatever information was favorable to their position, and refuse to disclose any detrimental facts. *Id.* This result would be unjust, as it would allow the defendants to have their cake and eat it too. Therefore, if the defendants choose to rely upon the privilege at trial, they may do so, but they must do so absolutely, in accordance with the directive of this order.

116 F.R.D. at 452-53 (emphasis added). At footnote 2, the District Court made its Order and rationale even clearer. The Court stated

> that the reporter cannot indicate to the jury that he has confidential sources, and then refuse to allow cross-examination into the identity and nature of those

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cross-examination) would still require a continuance for full discovery in order to enable the plaintiff to conduct *effective* cross-examination. This protection for the libel plaintiff's just interests spotlights the intolerable prejudice which would flow from using a confidential source as a witness testifying only through the surrogate mouths of reporters without any discovery or any possibility of effective cross-examination.

> sources. By requiring the absolute assertion of the privilege, the Court will allow the reporter to maintain the integrity of his sources, but will prevent him from using the privilege as a sword as well as a shield.

Id. at 453. The *Laxalt* court thus avoided the constitutional problem created by the Pennsylvania Supreme Court's application of the Pennsylvania Shield Law.

The cogent and compelling analysis given in *Greenberg* and *Laxalt* demonstrates the underlying due process violation in allowing a reporter to "have his cake and eat it too" by using the shield law as a sword to give "whatever information was favorable to their position, and refuse to disclose any detrimental fact." *Kapiloff v. Dunn*, 27 Md. App. 514, 343 A.2d 251, 257 (1975) (Court noting that trial court has ordered that defendants be precluded at trial from asserting in any manner "whether by affirmation, implication, or denial" that the article in question was reviewed by "highranking employees" whom they refused to disclose).

Due process simply does not allow a party to tell a packaged story about information given by alleged reliable "confidential sources" without ever subjecting the information to any feasible means of cross-examination or verification. *E.g.*, *Brock v. Roadway Express, Inc.*, 107 S.Ct. 1740, 1749-50 (1987) (preliminary procedures regarding employee discharge do not require cross-examination where final assessment provides "opportunity for complete cross-examination); *Pennsylvania v. Ritchie*, 107 S.Ct. 789, 799 (1987) ("Of course the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable.") No one but the reporter can ever know what is inside a sealed package of "confidential sources." To permit such a package to come into evidence as an affirmative defense in order to prove that the defendant had reliable sources and verified information (and therefore did not knowingly or recklessly disregard the falsity of a defamation) is to render public official libel actions extinct and open the floodgates to unrestrained falsehood in the marketplace of ideas.

The denial of cross-examination at trial is not, of course, a mere matter of discretion of a state's highest court. As stated by Judge Becker, concurring the *Coughlin, supra,* 780 F.2d at 349, the plaintiff has a "property interest in reputation" which therefore subjects state actions to federal due process scrutiny. The interest in reputation "reflects no more than our basic concept of the essential dignity and worth of every human being." *Rosenblatt v. Baer,* 383 U.S. 75, 92 (1966) (Stewart J. concurring). Because at least twenty six (26) states have shield laws,[3] the due process violation presented by the Pennsylvania Supreme Court's application of its Shield Law bodes nothing but ill to the federal due process rights of libel plaintiffs across the nation. The conflict between the Pennsylvania Supreme Court's willingness to cancel the opportunity for cross-examination and the contrary analysis of *Greenberg* and *Laxalt* presents in concrete terms the very issue which this Court already anticipated in its comments in *Philadelphia Newspapers, Inc. v. Hepps, supra.*

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3. *See* Ala.Code Section 12-21-142 (1975); Alaska Stat Sections 09.25.150-.220 (1983 & Supp. 1984); Ariz.Rev.Stat.Ann. Section 12-2237 (1982); Ark.Stat.Ann. Section 43-917 (1977); Cal. Evid.Code Section 1070 (West Supp. 1985); Del.Code.Ann. tit. 10, to Sections 4320-4326 (1974); Ill.Ann.Stat. ch. 110 Sections 8-901 to -909 (Smith-Hurd 1984); Ind.-Code.Ann. Section 34-3-5-1 (Burns 1983 & Supp, 1984); Ky. Rev.Stat.Ann. Section 421.100 (Baldwin 1979); La.Rev.Stat.Ann. Sections 45:1451-1454 (1982); Md.Cts. & Jud.Proc.Code Ann. Section 9-112 (1984); Mich. Comp. Laws Ann. Section 767-51 (West 1982); Minn. Stat. Sections 595.-021-025 (1982) Mont.Code Ann. Sections 26-1-901 to -903 (1983); Nev.Rev.Stat. Sections 20-144 to 147 (1977); Nev.Rev.Stat Section 49-275 (1981); N.J.-Stat.Ann. Section 2A:84A-21 to -21.9 (West Supp. 1984-1985); N.M.Stat.Ann. Section 38-6-7 (Supp. 1984); N.Y.Civ.Rights Law & 79-h (McKinney 1976 & Supp. 1984-1985); N.D.Cent. Code Section 31-01-06.2 (1976); Ohio Rev. Code Ann. Sections 2739-04-12 (Page 1981); Okla.Stat. tit. 12, Sections 2506 (1981); Or.Rev.Stat. Sections 44.510-540 (1983); 42 Pa.Con.Stat.Ann. Section 5942 (Purdon 1982); R.I.Gen.Laws Sections 9-19.1-1 to -3 (Supp. 1984); Tenn. Code Ann. Section 24-1-208 (1980).

WHEREFORE, for all the above reasons, this Honorable Court should note probable jurisdiction of this appeal.

Respectfully submitted,

BEASLEY, CASEY, COLLERAN, ERBSTEIN, THISTLE, KLINE & MURPHY

BY: _____

JAMES E. BEASLEY
WILLIAM P. MURPHY
21 South 12th Street
Philadelphia, PA 19107-3683

Counsel for Appellant

APPENDIX

[J-261]
IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

RICHARD A. SPRAGUE,	:	No. 49 E.D. Appeal
Appellant	:	Dkt. 1987
v.	:	
GREG WALTER, KENT POL-	:	
LOCK, HOWARD SHAPIRO,	:	
EUGENE L. ROBERTS, JR.,	:	
CREED C. BLACK, MICHAEL	:	
PAKENHAM, AARON EPSTEIN,	:	
PHILADELPHIA	:	
NEWSPAPERS, INC., and	:	
KNIGHT NEWSPAPERS, INC.	:	

ORDER

PER CURIAM:

AND NOW, this 7th day of July, 1988, the Application for Reargument is denied.

SUPREME COURT OF PENNSYLVANIA
Eastern District

RICHARD A. SPRAGUE,	:	No. 49 E.D. Appeal
Appellant	:	Dkt. 1987
v.	:	
GREG WALTER, KENT POL-	:	
LOCK, HOWARD SHAPIRO,	:	
EUGENE L. ROBERTS, JR.,	:	
CREED C. BLACK, MICHAEL	:	
PAKENHAM, AARON EPSTEIN,	:	
PHILADELPHIA	:	
NEWSPAPERS, INC., and	:	
KNIGHT NEWSPAPERS, INC.	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the ORDER of the SUPERIOR COURT, be, and the same is hereby AFFIRMED.

Marlene F. Lachman, Esq.
Prothonotary

Dated: 5/31/88

Richard A. SPRAGUE, Appellant

v.

Greg WALTER, Kent Pollock, Howard Shapiro, Eugene L. Roberts, Jr., Creed C. Black, Michael Pakenham, Aaron Epstein, Philadelphia Newspapers, Inc., and Knight Newspapers, Inc., Appellees.

Supreme Court of Pennsylvania.

May 31, 1988.

James E. Beasley, William P. Murphy, Philadelphia, for appellant.

Samuel E. Klein, Frank L. Corrado, Jr., Philadelphia, for amicus curiae — The Greater Phila. Chapter of the American Civil Liberties Union.

Before NIX, C.J. and FLAHERTY, ZAPPALA and PAPADAKOS, JJ.

OPINION

NIX, Chief Justice.

This is an appeal by allowance from an order of the Superior Court granting a new trial in a libel action against a newspaper. The issues presented arise from evidentiary rulings by the trial court. Review was granted because the issues herein implicate the relationship between the federal and state constitutional provisions relating to free speech and reputation and the statutorily created privilege conferred upon a media defendant, commonly known as the "Shield Law." It has become increasingly apparent that the confines of that privilege must be more clearly delineated. It is appropriate to begin with a summary of the procedural history which provided the setting for the trial rulings that are here for consideration.[1]

In 1973 one Richard A. Sprague, Esquire, commenced a libel action against Philadelphia Newspapers, Inc. ("PNI"),

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1. An extensive recitation of the facts of this case may be found in the Superior Court's opinion, reported at 357 Pa.Super, 570, 516 A.2d 706 (1986).

publisher of the *Philadelphia Inquirer,* a daily newspaper of general circulation. Sprague's complaint, filed in the Court of Common Pleas of Philadelphia County, alleged that he had been falsely and maliciously defamed by two series of articles published by the newspaper in late March and early April 1973. Also named as defendants in the suit were various reporters and editors of the *Inquirer,* as well as the corporate owner of PNI. Of the reporters named as defendants, Greg Walter, Howard F. Shapiro and Kent Pollock were the actual authors of the allegedly defamatory articles. At the time the newspaper articles were published Richard Sprague was First Assistant to the District Attorney of Philadelphia. Prior to attaining that position, he had been chief of the homicide division of the District Attorney's Office.

The first series of *Inquirer* articles concerning Sprague, published in late March of 1973, indicated that he, while First Assistant District Attorney, had participated in a certain illegal wiretapping scheme. In April of 1973, the *Inquirer* followed with a series of articles which related that Sprague, at a time ten years prior when he was chief of the homicide division, had prevented the bringing of homicide charges against the son of a certain high official of the Pennsylvania State Police. This second series of articles conveyed the impression that Sprague's treatment of the homicide case was motivated by personal favoritism toward the official. The *Inquirer* articles implicating Sprague in the wiretapping episode were written partly by reporter Greg Walter and partly by reporter Howard Shapiro; the articles about the ten-year old homicide case were co-authored by Walter and another reporter, Kent Pollock.

The libel action here involved proceeded to trial before a jury; those proceedings lasted more than six weeks and generated over four thousand pages of transcribed testimony. The plaintiff, Sprague, presented evidence tending to show that the imputations of wrongdoing set forth about him in the *Inquirer* articles were false. He also produced evidence which, if believed, would support an inference that the newspaper articles were published with knowledge of their falsity or with reckless disregard of their truth or falsity, *i.e.,* that the statements were

made with "actual malice." As part of his proof on the issue of malice, Sprague disclosed that, several months before the appearance of the articles in question, he had successfully prosecuted reporter Greg Walter on criminal charges for illegal wiretapping. In that regard, the defamation plaintiff also presented testimony from Walter's former girlfriend which indicated that the reporter had expressed a desire to "get Sprague" because of the prosecution.[2]

To meet the case put on by the plaintiff, PNI sought to negate an inference of "actual malice." To that end, the defense undertook to establish that the newspaper articles were not statements made with knowledge of their falsity, or made with reckless disregard of whether they were false or not, but rather were good-faith statements honestly based on information supplied by reliable and confidential "sources." In support of this contention, the first witness called by the defense was reporter Kent Pollock, co-author of some of the articles.

In the course of Pollock's testimony on direct examination, defense counsel alluded to one of the articles concerning the homicide case and asked the witness to relate how he obtained the information put forth in the article. In response, Pollock began by stating that the information had come from "an individual" to whom he had spoken. When the reporter sought to continue by recounting *what* the unnamed person had told him, the trial judge interrupted with an inquiry as to *the informant's identity.* Pollock answered the court's question by starting: "This is a person who was very close to [the suspect's] family, sir, who is a source of mine." At that point, counsel for the plaintiff demanded that the witness reveal the identity of the mentioned informant. Defense counsel objected to the demand, asserting that reporter Pollock had a legal privilege, embodied in Pennsylvania's Shield Law, not to divulge his confidential

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2. Following the presentation of Sprague's case-in-chief, a non-suit was granted as to PNI's corporate owner. As to the other defendants, Sprague entered into a stipulation whereby he would drop them from the case, upon the condition that he be permitted to try the case as if they were still parties.

sources. The trial judge then recessed the proceedings, to conduct an *in camera* hearing as to the merits of the objection.

During the *in camera* hearing before the trial court, defense counsel asserted that the Shield Law permitted reporter Pollock to testify fully as to the information obtained from his source without having to disclose the source's identity, and that no adverse inference or other sanction should result from the exercise of the privilege. The defendant further contended that the privilege conferred by the Shield Law is one mandated by the First Amendment of the United States Constitution, and that if the exercise of the privilege impedes a plaintiff's ability to question the reliability or genuineness of a newsman's source the balance should be struck to favor the free flow of information to the media. The plaintiff, on the other hand, argued that the Shield Law did not demand the interpretation sought by the defendant, and that the privilege is merely an investigative tool which is dissipated once the information from the source is put into print and published. Counsel for the plaintiff further argued that the remedy for failure to reveal a source should be an "adverse inference" charge by the court.

Upon considering the competing arguments, the trial court ruled in favor of the plaintiff. The court concluded that the Shield Law was inapplicable and that the defendant had no constitutional right to conceal the identity of its sources. Based on that determination, the court ordered the defendant to disclose its sources. The order further stated:

> If the defendant chooses not to reveal their [sic] sources, it is precluded from defending this action on the grounds that the articles in the suit, or any portion thereof, were based upon information received from a reliable, but undisclosed source.
>
> In order to implement this Order, all evidence of what information defendants [sic] received from allegedly reliable, but undisclosed sources, shall be excluded.

Notwithstanding the above mandate, reporter Pollock and another reporter-witness, Robert J. Terry, persisted in asserting

the Shield Law when asked, on cross-examination, to name the sources of the information contained in the newspaper articles. The record shows that the defense witnesses invoked the Shield Law twenty-six times during cross-examination by the plaintiff.

Because the defendant had elected not to disclose its sources, the trial judge, at the time of charging the jury, applied the sanction prescribed in his order: all evidence derived from such sources was to be excluded from the jury's consideration. The jury was instructed to disregard all testimony of defense witnesses as to what information had been obtained from unnamed sources. The court then proceeded to specify for the jurors the items of evidence to be stricken;

> (1) The contents of a document, mentioned in one of the articles, purportedly linking plaintiff Sprague to the illegal wiretapping scheme. This document was testified to by reporter Pollock, but he refused to reveal its source.
>
> (2) Testimonial reference by Pollock to a statement in one of the articles that Sprague had boasted of his influence with the father of the suspect in the homicide case. Pollock refused to disclose the identity of the person who supposedly heard Sprague's remarks.
>
> (3) Testimonial reference by Pollock to a statement in one of the articles that Sprague had spent an entire day at the home of the father of the homicide suspect. Pollock refused to disclose the source of the statement.
>
> (4) Testimonial reference by Pollock to information he allegedly received from a "contact" close to the family of the homicide suspect. Pollock declined to identify the "contact."
>
> (5) Testimonial reference by reporter Robert Terry to information received from an unnamed source about the homicide case. Terry refused to identify the source.

The trial court's charge was designed to implement its earlier ruling as to the consequences of a refusal by PNI to disclose the identity of its sources. The plaintiff would have had the court go

further with its charge, and instruct that the failure to reveal sources would warrant a finding "that there were no sources." The court refused that request.

As noted, *Inquirer* reporter Greg Walter had authored some of the allegedly defamatory articles and had co-authored others. He also had been credited with doing most of the investigative work which preceded them. According to the plaintiff, the articles were shaped in large part by Walter's ill-will toward him. It is thus apparent that Walter was a key figure in the litigation. However, he was never called as a witness at trial. Prior to the commencement of trial, defense counsel stated to the court that Walter could not appear as a witness, for reasons of health. Because of that representation, plaintiff's counsel, in his case-in-chief, resorted to reading into the record segments of a partially completed deposition which had been taken from Walter. However, at a later point in the trial, counsel for the plaintiff expressed doubts about Walter's physical infirmity; and indicated to the court that the reporter was then currently travelling about the state and writing newspaper articles. At the plaintiff's request the trial court issued a subpoena to secure the courtroom presence of Greg Walter, so that a determination could be made as to his physical condition.

Walter complied with the subpoena and appeared in court at the requested time with his physician, Dr. Fred D. Holford. At that point, the defense presented the court with a letter from Dr. Holford stating that he had performed a second arterial coronary bypass on Walter, and that it would be medically inadvisable for the reporter to undergo the stress of being a trial witness. The defense also offered to have Dr. Holford testify *in camera;* but that request was denied by the court, ruling that such evidence had to be presented in open court before the jury. In the view of the trial judge, the question of whether Walter should be deemed unavailable for reasons of health was for the jury to determine. Notwithstanding the court's ruling in this regard, the defendant declined to have Dr. Holford testify before the jury to substantiate its assertion about Walter's condition.

Although Walter himself remained in the courtroom for the rest of the trial, neither party called him to testify about the newspaper articles. However, the trial court accepted the plaintiff's argument that Walter was within the control of PNI, that Walter's testimony properly would have been a part of PNI's case, and that PNI had failed to establish that the reporter was medically unavailable as a witness. The court, having accepted the above assertions, proceeded to grant the plaintiff's request for a "missing witness" or "adverse inference" charge. That is, the court instructed the jury that the failure of the defendant, PNI, to call Walter as its witness permitted an inference that his testimony would have been unfavorable to the defendant.

The jury's deliberation of the case resulted in a verdict for the plaintiff and an award of $4,500,000. The award consisted of $1,500,000 as compensatory damages and $3,000,000 as punitive damages. PNI followed with motions for a judgment *non obstante veredicto* and for a new trial. Those motions were denied by a court *en banc*. From the order denying post-trial relief PNI appealed to the Superior Court, which, upon review, affirmed in part and reversed in part.

The Superior Court determined that the common pleas court was correct in denying PNI's motion for a judgment n.o.v. In that regard, the Superior Court extensively and thoroughly recounted the evidence, and concluded that the plaintiff's proof was sufficient to create a jury question as to defamation, falsity and "actual malice," even under the standard of proof dictated by *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). However, with regard to the applicability of the Shield Law and the propriety of the "adverse inference" charge relating to reporter Greg Walter, the Superior Court decided that the trial court had committed reversible error in both respects. Accordingly, the Superior Court granted PNI a new trial.

Our first departure with the analysis employed by the Superior Court in its resolution of the matter is its "broad" interpretation of the privilege provided under the Shield Law. Section 5942 of the Judicial Code, 42 Pa.C.S. § 5942, which

throughout this lawsuit has been referred to as the "Shield Law", provides in pertinent part:

Confidential communications to news reporters

> (a) **General rule.** – No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit[3]

The clear language of section 5942(a) provides that persons covered by it are not required *to disclose the source* of the information "in any legal proceeding, trial or investigation before any government unit." This language is in no way ambiguous and its direction is clear. It was obviously designed to protect the confidentiality of the source, and we are constrained under the rules of statutory interpretation to accept its plain meaning. 1 Pa.C.S. §1921. A broad interpretation of the privilege provided under the section which would require either the acceptance of the reliability of the unidentified source, or the verification of the content of the communication, is not warranted by the language of the section nor any precedent in this jurisdiction.

[1] Traditionally, the recognition of privileged information in this Commonwealth has been designed to permit uninhibited disclosure between parties sharing a unique relationship. *See, e.g.*, 42 Pa.C.S. §§5916, 5928 (attorney-client); 42 Pa.C.S.

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3. Subsection (b) of this provision provides the following exception not relevant to our present inquiry.

> (b) **Exception.** – The provisions of subsection (a) insofar as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast. 42 Pa.C.S. § 5942(b).

§5923 (husband-wife); 42 Pa.C.S. §5929 (physician-patient); 42 Pa.C.S. §5943 (priest-penitent). Because our society is also one that encourages an open interchange of ideas between its members and seeks to maintain the free flow of such ideas to the media, there is an equally strong societal purpose in fostering uninhibited disclosure between individuals and the media. *See, e.g., Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 532 A.2d 346 (1987); *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963). The language of our Shield Law reflects this purpose by protecting the media against the forced disclosure of the identity of its sources. This particular privilege was clearly designed to be an absolute one in that it immunizes the media against any legal compulsion directed at requiring disclosure of the source of the information. However, it is not a necessary corollary to such a privilege that its exercise also carries with it a verification of the reliability of the information received or the reliability of the source from which the communication was received. Nor does the language of the Shield Law reflect that such was the intention of the legislature.

An inference can only be appropriately drawn when the predicate upon which it rests supports its validity. *See Henderson v. National Drug Co.*, 343 Pa. 601, 23 A.2d 743 (1942); *Hodgson v. Bigelow*, 335 Pa. 497, 7 A.2d 338 (1939); *Hornick v. Bethlehem Mines Corp.*, 307 Pa. 264, 161 A. 75 (1932). In contrast, the Shield Law privilege was designed to encourage communication from even the most unsavory sources. To assume the veracity of the information supplied would presume the trustworthiness of the source and the validity of the informant's judgment in assessing the facts upon which the information was based. Such a proposition would require not only a blind faith in the integrity of the informant but also in the accuracy of his judgment. The bearing of false witness has always been abhorrent to our Judaic-Christian concept of fairness. The requirement of an oath or affirmation, and our laws protecting against perjury or false statements, reflect our continuing concern for the trustworthiness of assertions of fact offered in judicial proceedings. To accept the Shield Law privilege as attesting to the reliability of the source as well as protecting its

identity not only extends the plain language of the provision without justification, but would also sanction the creation of an inference entirely lacking in foundation. Such a result is offensive to settled rules of statutory construction, 1 Pa.C.S. §1922(1), and would undermine the integrity of our fact finding process.

In attempting to justify its adoption of an expansive reading of our Shield Law provision, the Superior Court relied heavily upon the language appearing in our decision in *In re Taylor, supra,* and its own ruling in *Hatchard v. Westinghouse Broadcasting Co.*, 350 Pa.Super. 1, 504 A.2d 211 (1986). However, we subsequently reversed the Superior Court's *Hatchard* decision and modified the expansive interpretation of the Shield Law as set forth in *Taylor. Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 532 A.2d 346 (1987). We adhere to that modified view today in holding that the privilege provided under the Shield Law was not intended to allow a media defendant to use any of its sources and information *as proof of* verification or evidence of responsibility when it opts to rely upon the privilege.

[2] However, the fact that the privilege does not carry with it a concomitant inference either as to the reliability of the information conveyed or the media's responsibility in relying upon it, does not foreclose the media defendant from introducing extrinsic evidence to establish the validity of the information or to demonstrate that they acted responsibly in the dissemination of the information. By undertaking the introduction of such evidence, the media defendant is not required to abandon its Shield Law privilege; nor does it relieve the plaintiff of the burden of proof. This evidence is simply to be weighed by the fact finder in assessing whether the plaintiff has met the burden of proof.

[3] Having determined the legislative intent regarding the privilege and its effect in the instant setting, we now must turn to the question as to whether either federal or state constitutional mandate requires something more in this context.

Under the United States Supreme Court's decision in *New York Times Co. v. Sullivan, supra,* and its progeny, a public

official may not recover damages for a defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280, 84 S.Ct. at 726; *Time, Inc. v. Pape,* 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971); *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); *see Monitor Patriot Co. v. Roy,* 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971) (rule applies to publication concerning candidate for public office); *Garrison v. Louisiana,* 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (rule applies to criminal prosecution for defamation of a public official). In the *New York Times* decision the Court also placed the burden of proving both the falsity and the "actual malice" of the allegedly defamatory statements upon the public official-plaintiff. The Court specified that such a plaintiff could not rely on former common law presumptions to satisfy those burdens. 376 U.S. 279, 283-284, 84 S.Ct. at 727-728.[4] This mandate requires the public official-plaintiff to carry both the burdens of production and persuasion.[5] Since we interpret the *Times* mandate as prohibiting the shifting of either of these burdens to a media defendant,[6] we can discern no implied federal constitutional mandate that would require the creation of inferences in favor of the media defendant, particularly where such a construction would require straining the clear meaning of the statutory language and would necessitate the creation of inferences which lack rational foundation.

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4. In *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), the Court held that the common law presumption of falsity violates the First Amendment even where a newspaper is sued for libel by a private figure.

5. We will discuss *infra* the propriety of the trial court's adverse inference charge in this context.

6. The common law presumptions which were barred in these cases were devices which were designed to shift both or either of the burdens from the plaintiff. Thus, the direction that they not be employed implicitly mandates that the burden must remain throughout upon the public official-plaintiff in a defamation action against a media defendant.

The difficulty of a public official-plaintiff in establishing malice in an action against a media defendant is evidenced in the United States Supreme Court's decision in *St. Amant v. Thompson, supra.* In *St. Amant* the Court emphasized that the burden requires more than a consideration of whether a reasonably prudent man would have published the article without further investigation, but rather requires the presentation of "sufficient evidence to permit the conclusion that the defendant in fact *entertained serious doubts* as to the truth of his publication." 390 U.S. at 731, 88 S.Ct. at 1325. Recognizing the license given to the media under this standard, the Court justified its position as follows:

> Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not. *Id.* at 732, 88 S.Ct. at 1326.

It is clear that the Supreme Court has set forth the parameters necessary to satisfy the dictates of the First Amendment. Any further action on our part could run afoul of our state constitution. Under Article I, section 1 of the Constitution of this Commonwealth, a person's interest in his or her reputation has been placed in the same category with life, liberty and property. *Hatchard v. Westinghouse Broadcasting Co., supra; Meas v. Johnson,* 185 Pa. 12, 19, 39 A. 562, 563 (1898). Additionally, Article I, section 11 declares that: "[E]very man for an injury done him in his lands, goods, person *or reputation* shall have remedy by due course of law. . . ." (Emphasis added.) The redress provided under our body of substantive law is an action in tort for defamation. To gratuitously embellish upon the stringent requirements of current federal constitutional law, by means of an overly broad interpretation of a state statute, would

be in conflict with the recognition given by our state's constitution to a citizen's right to protect his or her reputation. Moreover, to create fictional inferences to aid a party who does not bear the burden of proof would impermissibly undercut the state constitutional interest in providing redress for defamation. The Shield Law was designed to protect the free flow of information between the media and its sources. This objective must be distinguished from a license to the media to use information recklessly and/or maliciously to destroy the reputation of a citizen.

We therefore conclude that the legislative intention was not to confer the broad interpretation to the Shield Law suggested by the Superior Court, that it is not required by the federal constitution, and that it would be repugnant to our own constitution.

[4] Having concluded that the General Assembly by its passage of 42 Pa.C.S. §5942(a), the Shield Law, intended to confer upon the news media an absolute privilege against the disclosure of their sources, we now turn to the trial rulings that are the subject of this appeal. We need only address the objections raised relating to the testimony of Kent Pollock for the disposition of this appeal. Witness Pollock was offered to show that the defamatory statements in the articles he participated in were not recklessly made without regard to the truth of the assertions contained therein. After testifying as to his experience as a reporter up to the time of the publishing of the articles in question, he was permitted, over objection by plaintiff's counsel,[7] to describe the ongoing investigation from which the defamatory statements against the plaintiff arose. Pollock then proceeded to articulate various pieces of information he had received from unidentified sources which formed the basis for the statements made in the challenged articles. The trial court ultimately ruled that, if the defendant failed to

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7. The objections were made to the hearsay evidence that was permitted in describing the investigation. The trial court overruled these objections on the grounds that this evidence was not to be used for the proof of the facts asserted but rather as evidence of the state of mind of the reporter at that time. See Reproduced Record Vol. V, pgs. 2862(a)-2865(a).

disclose the sources of this information, it would be precluded from defending on the grounds of any information supplied by these unidentified sources. We note that the trial court in a very difficult and complex area attempted to adjust competing interests in a fair and judicious manner. The difficulty arose from the prevailing uncertainty as to the proper application of our Shield Law in the context of present defamation law.[8] Nevertheless, we are constrained to agree with the Superior Court that the ruling was erroneous and that the error requires the grant of a new trial.

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8. Subsection (a) of the current Shield Law, 42 Pa.C.S. §5942(a), is substantially a reenactment of section 1 of the Act of June 25, 1937, P.L. 2123, 28 P.S. §330 (repealed). When the original statute was enacted in 1937, the law of defamation was such that the plaintiff had the benefit of several evidentiary and procedural advantages. For example, a defamatory statement was presumed to be false. *E.G., Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971) (recognizing proposition as long standing rule); *Hartranft v. Hesser*, 34 Pa. 117 (1859). If the defendant wished to defend on the ground that the defamatory communication was true, he had the burden of proving it. *Montgomery v. Dennison*, 363 Pa. 255, 69 A.2d 520 (1949); *Mulderig v. Wilkes-Barre Times*, 215 Pa. 470, 64 A. 636 (1906); *Bryant v. Pittsburgh Times*, 192 Pa. 585, 44 A. 251 (1899); *Chapman v. Calder*, 14 Pa. 365 (1850). Moreover, unless the statement came within some legal privilege, it was presumed to have been made with malice. *Corabi, supra; Neeb v. Hope*, 111 Pa. 145, 2 A. 568 (1886); *Barr v. Moore*, 87 Pa. 385 (1878). For a defendant to have the protection of a privilege, such as the one that existed for statements about matters of public concern, he had to first establish, *inter alia*, that the statement was made with a reasonable belief in its probable truth. *E.g., Morgan v. Bulletin Co.*, 369 Pa. 349, 85 A.2d 869 (1952); *O'Donnell v. Philadelphia Record Co.* 356 Pa. 307, 51 A.2d 775 (1947); *Hartman v. Hyman & Lieberman*, 287 Pa. 78, 134 A. 486 (1926); *Neeb v. Hope, supra.* It was only after the defendant had proved the elements of privilege that it became the plaintiff's burden to prove *actual malice. Morgan v. Bulletin Co., supra.*

Given the state of defamation law when the 1937 Shield Law was enacted, the conclusion must be drawn that there was no contemplation on the part of the legislature that the statute would present any obstacle to a person seeking redress for injury to his reputation. It was only with the advent of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its decisional offspring, that Pennsylvania's Shield Law presented a problem for plaintiff's suing media defendants for defamation.

While the reporter's information is properly admitted and no adverse inference may be drawn from the invocation of the Shield Law, the trial court must also instruct the jury that the invocation of the Shield Law does not establish an affirmative inference either as to the reliability of the source or as to the validity of the information received. The plaintiff is free to introduce rebuttal evidence and/or argue that the record does not disclose any evidence to support the reliability of the information received or the credibility of the source that supplied that information.

[5] Because the burden of proof remains upon the plaintiff throughout the trial, the defendant may choose not to offer evidence and may still prevail if the jury concludes that plaintiff has failed to meet the burden. If a defendant chooses to dispute the plaintiff's evidence, then that evidence in response must be critically evaluated. This is not a shifting of the burden; rather it is evidence that must be evaluated by the fact finder in determining whether the burden of proof has been met by plaintiff. The trial court's responsibility in its charge is to assist the fact finder in understanding its role in evaluating the evidence presented. *E.g., Smith v. Clark,* 411 Pa. 142, 190 A.2d 441 (1963). In discharging this responsibility, the trial court in its instructions should make clear for the jury, (a) that the burden of proof remains upon the plaintiff throughout the trial; (b) that, if the Shield Law is invoked by the defendant to avoid disclosing a source, *no inference either favorable or adverse may be drawn from the act of invoking that privilege as to the reliability of the unidentified source or as to the accuracy of the information supplied;* and, (c) that the jury is to consider any evidence and/or arguments made by plaintiff and defendant as to the reliability of the undisclosed source and as to the accuracy of the information supplied.[9]

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9. When this Court decides that a new trial must be granted for reason of a particular error, we do not, as a rule, address other issues that have been presented. However, because the instant matter is a complex one and must be retried, we consider it appropriate to resolve another question which is likely to arise again, namely, the trial court's "adverse inference" charge relating to reporter Greg Walter. In our view, the issue of whether Walter was medically

Accordingly, for the reasons stated herein, the order of the Superior Court is affirmed.

LARSEN, McDERMOTT and STOUT, JJ., did not participate in the consideration or decision of this case.

NOTES *(Continued)*

incapable of being a witness for PNI was one that the trial court itself should have determined, not the jury. *Farley v. Southeastern Pennsylvania Transportation Authority,* 279 Pa.Super. 570, 421 A.2d 346 (1980). Clearly, if the question were one of a witness' mental competency to testify, the determination would be one for the trial court to make. *E.g., Commonwealth v. Goldblum,* 498 Pa. 455, 447 A.2d 234 (1982). We see no reason to apply a different rule where the issue relates to a person's physical capacity to testify as a witness. In sum, we agree with the Superior Court's conclusion that the trial judge in the instant case erred in ruling that it was a jury question.

Richard A. SPRAGUE

v.

Greg WALTER, Kent Pollock, Howard Shapiro, Eugene L. Roberts, Jr., Creed C. Black, Michael Pakenham, Aaron Epstein and Philadelphia Newspapers, Inc. and Knight Newspapers, Inc.

Appeal of PHILADELPHIA NEWSPAPERS, INC.

Superior Court of Pennsylvania.

Argued Feb. 20, 1986.
Filed July 31, 1986.
Reargument Denied Sept. 30, 1986.

Samuel E. Klein, Philadelphia, for appellant.

James E. Beasley, Philadelphia, for appellee.

Before BROSKY, POPOVICH and MONTGOMERY, JJ.

POPOVICH, Judge:

This is an appeal from a judgment of 4.5 million dollars entered against Philadelphia Newspapers, Inc. (PNI)[1] following a trial by jury in which the then First Assistant District Attorney of Philadelphia, Richard A. Sprague, was found to be defamed. We reverse in part and affirm in part.

PNI asks us to review the order of the trial court, affirmed by a court en banc, denying its motion for a new trial and/or judgment non obstante veredicto.

[1] We will first deal with the denial of a new trial. The standard on which our review is premised in granting or refusing a new trial is one in which we will not reverse absent an abuse

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1. It requires mentioning that all of PNI's outstanding stock is owned by Knight Newspapers, Inc., a litigant whose motion for a non-suit was granted following the presentation of Sprague's case-in-chief. As for the other defendants (i.e., Greg Walter, Kent Pollock, Howard Shapiro, Eugene L. Roberts, Jr., Creed C. Black, Michael Pakenham and Aaron Epstein), a stipulation was entered into whereby Sprague agreed to drop them from the case, with the condition that he be permitted the right to try the matter as though they were still parties to the suit.

of discretion or error of law which controlled the outcome of the case. *Allison v. Snelling & Snelling, Inc.*, 425 Pa. 519, 229 A.2d 861 (1967).

We begin with a recitation of the facts sufficient to dispose of the claim raised and reserve until later a more detailed accounting upon review of the judgment n.o.v. issue.

In September of 1972, Greg Walter was adjudged guilty in municipal court of violating Pennsylvania's wiretap law (18 P.S. §3742) for recording phone conversations while on the staff of the *Evening Bulletin*. The prosecutor was Richard A. Sprague, who recommended a sentence of fifteen days to one year imprisonment. An appeal was taken to Common Pleas Court, where, sometime in 1973, a stipulation was entered into, the sum and substance of which is not herein relevant.

Because of Walter's criminal status, his duties were curtailed by the *Bulletin*. This led to his securing employment with *The Philadelphia Inquirer*, which is published by PNI. One of Walter's first assignments occurred in the early part of 1973. An article by Walter appeared in a series of stories published by *The Inquirer* linking Sprague to illegal activity engaged in by members of the Pennsylvania State Police (then headed by Rocco Urella, Sr.). This supposed association was made by the discovery of an alias ("Nicholas Pratko") purportedly used by Sprague and exposed him to attack by impugning to him knowledge of and complicity in the activity, i.e., the wiretapping of the Pennsylvania Crime Commission's phones during its investigation of alleged corruption in the Philadelphia police department.

During the period the "Pratko" stories were being released, Walter also was working with another *Inquirer* reporter (Kent Pollock) in the investigation of a 1963 homicide of one John Applegate. Sprague, as Chief of Homicide for the District Attorney's Office, handled the matter which culminated in the two suspects (Rocco Urella, Jr. and his classmate, Donald Scalessa) being released.

With the resurrection of the Applegate case and Sprague's refusal to submit to questioning by Walter and Pollock because of asserted statements attributed to them that they were out to

"smear" him, *The Inquirer* decided to proceed to publish a number of articles in April of 1973 (credited to Walter and Pollock) detailing, and placing under scrutiny, Sprague's role in light of his "very close" ties with Rocco Urella, Sr., the father of one of the suspects.

Sprague filed a complaint in trespass contending that he had been libelled by the various articles and editorials appearing in *The Inquirer*. Following a trial which lasted approximately eight weeks and generated over four thousand pages in testimony, a jury awarded Sprague 1.5 million dollars in compensatory damages and 3 million dollars in punitive damages. This timely appeal was filed thereafter.

The first issue centers upon the propriety of the trial court's determination that PNI did not have the right to refuse to disclose its sources of information, and, upon failing to do so, all information related thereto was excluded from the jury's consideration.

The facts leading up to the exclusion start with Kent Pollock testifying on direct examination that the first he learned of Applegate was from a "source" who was very close to the Urella family. At this point in his testimony, the trial court interjected, "Who?" Counsel for Sprague seized the opportunity to seek a response to the question, while PNI's counsel objected. The matter was taken up in chambers.

Counsel for PNI argued that under Pennsylvania's Shield Law (42 Pa.C.S. §5942(a)) Pollock should be allowed to testify fully as to the information garnered from the source without having to divulge his/her identity, nor should any adverse inference be drawn from his exercise of this statutory and First Amendment privilege. Further, PNI's counsel contended that, to the extent that the exercise of this privilege would hinder the plaintiff's ability to scrutinize the genuineness of the source, a balance had to be struck in favor of preserving the identity of the source, otherwise the purpose of the Shield Law, i.e., to encourage the free flow of information, would be undermined.

Counsel for the plaintiff, on the other hand, envisioned the Shield Law as no more than an investigative tool, the effect of

which dissipated once the information conveyed by the confidential source was placed in print. Also, he felt that if a source signed an affidavit in support of the information given, this constituted a waiver of the privilege. Lastly, counsel for the plaintiff asserted that the remedy for failure to reveal a source should be an "adverse inference charge" by the court.

In response to the assertions of counsel, the trial court entered the following order:

> . . . the Court determines that in this case the Shield Law is inapplicable and that the defendants have no constitutional right to refuse to reveal its sources. Therefore, it is ordered that the defendant disclose its sources.
>
> If the defendant chooses not to reveal their sources, it is precluded from defending this action on the grounds that the articles in suit, or any portion thereof, were based upon information received from a reliable, but undisclosed source.
>
> In order to implement this Order, all evidence of what information defendants received from allegedly reliable, but undisclosed sources, shall be excluded.

PNI's attempt to secure extraordinary relief from the Supreme Court of Pennsylvania was "denied without prejudice" in a per curiam order. The trial resumed thereafter, and the instances in which PNI's witnesses (Pollock and Robert J. Terry, also a reporter for *The Inquirer*) invoked the privilege of the Shield Law, so as not to reveal the identity of their sources, occurred during their cross-examination and numbered 26 in total.

It was a month-and-half into the trial, and two witnesses short of PNI completing its case, before the court and the parties discussed in chambers what evidence would be kept from the jury's consideration because of the June 13, 1983 order relating to the Shield Law. After this conclave, the jury was instructed to disregard the testimony of certain witnesses because of sources that were not disclosed. The court also told the jury that the defendant(s) did not have a right to refuse to reveal its sources,

and, for doing so, "all evidence of what information defendants received from allegedly reliable, but undisclosed sources, shall be excluded."

The court proceeded to particularize the information that the jury was to ignore in its deliberations for the failure of the witnesses to disclose their sources in direct violation of his order:

First – Prosecution Memorandum (Exhibit P-3-2). This was testified to by Pollock as having been obtained from a source he refused to reveal. (This document was sent by the Pennsylvania Attorney General's Office to the District Attorney of Montgomery County, which was the location of a motor lodge where the State Police wiretapping of the Pennsylvania Crime Commission took place; and the first Pollock learned of the name "Pratko" – which was associated with Sprague, was from this instrument.)

Second – Any information with respect to the statement in *The Inquirer* article of April 1, 1973 that read: "Subsequent to the homicide, Sprague boasted to at least one of his friends that he 'could get anything I want from Rocco Urella,' according to a sworn statement by the friend obtained by The Inquirer."

Third – The language in the April 1, 1973 article to be deleted from consideration read: "Sprague's involvement with Urella Sr. became evident four days after the wiretaps were discovered when The Inquirer learned[] Sprague spent an entire day in conference with Urella at Urella's Delaware County home."

Fourth – Pollock's testimony of a contact close to Urella family who told him certain alleged things. Refusal to reveal source required exclusion of any evidence in respect to this statement.

Fifth – Terry's testimony that he had a source check police records to determine whether Applegate had criminal record was likewise to be removed from the jury's consideration.

At the close of the case, the court repeated its Shield Law directive and instructed the jury to "strike" from its consideration certain portions of the evidence. Numerous objections were lodged and denied; in particular, we cite counsel for the plaintiff's request that, as to the Shield Law, the jury should have been charged that "their failure to reveal sources would warrant a finding that there were . . . no sources; and therefore, that would constitute known falsity."

After the jury entered a verdict in favor of Sprague, timely post-verdict motions were denied, and judgment was affirmed by a court en banc (Judge Carson, dissenting).

The court below, in support of its decision that the Shield Law was inoperative to the facts, looked to a variety of material, one of which was the Pennsylvania Constitution, Art. 1 §§7 and 11. Perforce, the court interpreted §11 "as creating a constitutional right to defamation." This precise argument was rejected recently in a 5-4 decision by this Court, sitting en banc. See *Hatchford v. Westinghouse Broadcasting Co.*, 350 Pa.Super 1, 18-21 n. 12, 504 A.2d 211, 220-21 at n. 12 (1986), allocatur pending; see also *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 780 F.2d 340 (3rd Cir.1985).

The *Hatchford* majority concluded that the provisions of the Constitution mentioned above did not entitle a litigant access to a reporter's notes and other documentary material, as well as "outtakes", in the preparation of a libel suit against a newsmedia-defendant. Simply stated, the Court was not able to "agree that any of the constitutional provisions cited [,i.e., Art 1, §§1, 7 & 11,] . . . create[d] any right to bring a defamation action. . . ." *Id.* Accord *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F.Supp. 523, 528-29 (E.D.N.Y.1979).

The court also invites our attention to *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), a case in which the United States Supreme Court held that the First Amendment did not preclude a plaintiff's inquiries into the editorial processes leading to publication of an allegedly defamatory television program. However, we do not read anything in *Herbert v. Lando* to vitiate our ability to interpret the Pennsylvania Shield Law. The Court there merely stated that the First

Amendment does not afford a privilege to withhold editorial processes. As is relevant here, we note that there was no shield law in question before the high Court.

More on point, we believe, is the decision of *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). The issue there was the obligation of reporters to respond, under grand jury subpoenas, to questions relevant to an investigation into the commission of crime. The Court ruled that there was no constitutionally protected right to refuse to appear before a grand jury. Of interest to us is the manner in which the Court dealt with Branzburg's contentions.

The petitioner-Branzburg was a staff reporter for a daily newspaper in Kentucky which carried a story, under his byline, detailing his observation of two individuals synthesizing hashish from marijuana. A photograph of the hands of these individuals was included, and the article recited that the petitioner had promised not to reveal the identity of these two. When the petitioner was subpoenaed by the county grand jury, he appeared, but refused to identify the individuals involved. A state trial judge ordered the petitioner to answer the questions posed and rejected his contentions that the Kentucky reporters' privilege statute (substantively similar to Pennsylvania's Shield Law), the First Amendment or specified sections of the Kentucky Constitution authorize his refusal to answer.

[2,3] On appeal, the Kentucky Court of Appeals affirmed on the basis that, inter alia, its shield law did not offer someone a privilege to refuse to testify about events he had observed. Although the United States Supreme Court agreed, it is important to remember the Court's caveat that it was "powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." 408 U.S. at 706, 92 S.Ct. at 2669. This is exactly what we are doing here. Except, we find it unnecessary to embark on an analysis of our Constitution to decide whether the relief sought by PNI is permissible, for it is clear to us that in enforcing the privilege enacted by the Shield Law, we are to construe the statute broadly. See, e.g. *Lal v. CBS, Inc.*, 726 F.2d 97, 100 (3rd Cir.1980); *In re Taylor*, 412

Pa.32, 40, 193 A.2d 181, 185 (1963). Thus, to the extent the court below wishes us to follow the lead to the State of New York, which condoned the preclusion of a media-defendant's use of any of its sources and information as proof of verification or evidence of responsibility when it opted to rely on its statutory privilege—shield law (see *Greenberg v. CBS, Inc.*, 419 N.Y.S.2d 988, 997, 69 A.D.693 (1979)), we decline the invitation. To the same effect see *Newton v. NBC*, 11 Media Law Reporter 1950 (D.Nev.1985).

It is beyond cavil, as urged and relied upon by the court below, that the ruling at *In re Taylor, supra*, in which the scope of the precursor of the present Shield Law[2] was being construed, contained the following verbiage:

> The language of each Constitution [, i.e., state and federal,] is clear, and by no stretch of language can it protect or include under "freedom of the press," the non-disclosure of sources of information.

412 Pa. at 39, 193 A.2d at 184. If we were to proceed no farther in our reading, we might be inclined to agree with the court below sanctioning PNI for its election not to disclose its sources. We do not because one must "read on" to secure the full

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2. The then Act of 1937, as amended, pertinently provided in §1:
"No person, engaged on, connected with, or employed by any newspaper of general circulation as defined by the laws of this Commonwealth, * * * for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any court, grand jury, traverse or petit jury, or any officer thereof, * * *."

The present Pennsylvania Shield Law provides:

§5942. Confidential communications to news reporters

(a) **General rule.** — No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.
42 Pa.C.S. §5942(a).

meaning of the decision.

One learns that the media-defendant's right of non-disclosure was predicated upon the shield law, a statute which the Court repeatedly cautioned should be construed broadly so as to avail anyone invoking its privilege the right of non-disclosure with respect to "any source of any information". The defendant implemented the privilege to avoid having to disclose its sources to a grand jury investigating crime. This would appear to be consistent with the later ruling of *Branzburg v. Hayes, supra.*[3] Accord *Maressa v. New Jersey Monthly,* 89 N.J. 176, 445 A.2d 376, 383 (1982), *cert. denied,* 459 U.S. 907, 103 S.Ct. 211, 74 L.Ed.2d 169 (1982).

The *Taylor* Court was quite emphatic in its belief that:

> It is a matter of widespread common and therefore of Judicial knowledge that newspapers and news media are the principal source of news concerning daily local, State, National and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this

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3. The portion of the text of the *Branzburg* opinion relied upon reads:
> There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to require a newsman's privilege, either qualified or absolute.

408 U.S. at 706, 92 S.Ct. at 2669. See also Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317 (1970).

> public shield against governmental inefficiency, corruption and crime be preserved against piercing and *erosion.*

412 Pa. at 41, 193 A.2d at 185 (Emphasis added in part; footnote omitted). This tenet has been most recently re-affirmed by our Supreme Court in *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374 (1984), rev'd on other grounds ____ U.S. ____, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), albeit in dicta (see *Hatchard, supra*), to embrace the libel arena.

The United States Supreme Court reversed the *Hepps* decision so as to require a private individual-plaintiff to prove falsity in a defamation action. In the course of doing so, it recounted that during the Common Pleas Court trial, *The Inquirer* took advantage of Pennsylvania's Shield Law on a number of occasions, with the result that the trial court refused to give a charge benefitting either side on the ramifications of invoking the privilege. This fact was grasped by our Supreme Court as a tradeoff for continuing to place the common law burden of proving truth on *The Inquirer,* since it felt that the law of libel was heavily weighed, already, in favor of the media-defendant. The United States Supreme Court did not agree that the libel scales were unnecessarily tipped toward the media-defendant and decided to shift the burden of proof as to "actual malice" (a concededly high obstacle to hurdle) back to the plaintiff.

The question arises: Is the trial court's remedial (exclusionary) measure tantamount to returning the scales in libel cases to a posture other than that set by the United States Supreme Court in *Hepps?* It would be if one equates the requirement that the defendant disclose its "sources" (going forward with the evidence) to be a prod, in essence, to prove the truth of the articles or suffer the consequences of exclusion. We deem it to be.

It is obvious to this Court that the plaintiff in *Hepps* was not to be accorded any preferential, procedural treatment by requiring the defendant to bear the burden of proving falsity to resolve a perceived imbalance in the law of libel when it came to proof. The Pennsylvania Supreme Court's belief to the contrary, its

attempt to ameliorate the situation by pointing to the use of the Shield Law by the defendant as an equalizer, although not endorsed by the United States Supreme Court, was not condemned as constitutionally infirm. This is evident from the Court's remark that, "[i]n the situation before us, we are unconvinced that the State's shield law requires a different constitutional standard than would prevail in the absence of such a law." ____ U.S. at ____, 106 S.Ct. at 1565. Thus, the Shield Law was stated to have no appreciable affect on the burdens of proof as the case stood before the high Court, which obviously was cognizant of the role played by the statute at trial without the attending exclusion of "source" evidence from the jury's purview.

To sanction the trial court's procedural recourse would be, we believe, to invalidate Pennsylvania's long-standing practice of establishing rules of evidence and privilege by legislative action. See *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 603 F.Supp. 377, 381 (E.D.Pa.1985), aff'd 780 F.2d 340 (3rd Cir.1985). Moreover, to conclude otherwise would be in derogation of our Supreme Court's admonition in *Taylor* to guard against an "erosion" of the Shield Law. In the same vein, we find the offer made to PNI by the trial court, i.e., either disclose your sources or suffer the loss of *all* evidence related thereto being considered by a jury on the question of liability, to be no choice at all – a Hobson's choice. See *Taylor*, 193 A.2d at 186 (Redacting the informant's name from documents and then making them available to other side was felt by the Court "realistically" to nullify the object and intent of the shield law).

[4] We hold that the trial court, by excluding relevant evidence from the jury's bailiwick was, in effect, "exacting" a penalty upon the defendant for its exercise of a statutory right,[4] and trying to accomplish by indirection what it could not achieve

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4. We mention for edification purposes that it is not the practice in this Commonwealth to resort to the use of an adverse inference to neutralize one's invocation of any of the other statutorily created privileges relating to non-disclosure. See 42 Pa.C.S. §5923 (Spouses); 42 Pa.C.S. §5928 (Attorney – Client); 42 Pa.C.S. §5929 (Doctor – Patient); 42 Pa.C.S. §5943 (Priest – Penitent).

directly. See *Branzburg, supra,* 408 U.S. at 681, 92 S.Ct. at 2656-57; *Jamerson v. Anderson Newspaper, Inc.,* 469 N.E.2d 1243, 1250 (Ind.App.1984).

Futhermore, Sprague's contention that PNI's position would permit it to use the Shield Law as a "sword", resulting in a deprivation of his due process rights to explore the reasonableness of the reporters' pre-publication actions is not persuasive. See *Coughlin, supra,* 780 F.2d at 342 ("Shield Law does not . . . result in a denial of due process in violation of the fourteenth amendment of the United States Constitution.")

To the extent that the New York Supreme Court takes a different approach to resolve this vexing set of circumstances, see *Greenberg v. CBS, Inc., supra,* we prefer to retain the spirit of our Shield Law intact and not debilitate it by veiled attempts to strike a balance in an area which we believe is best left to the Legislature to resolve, as has been the case in one state. See Tenn.Code.Ann., Sec. 24-1-208(b), wherein the absolute privilege of the shield law is rendered nugatory "with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action asserts a defense based on the source of such information." For an analogous setting see *Hatchard, supra* at 222 n.12.

Of the 26 states which currently have Shield Laws,[5] 8, including Pennsylvania, have what has been described as "the

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5. See Ala. code §12-21-142 (1975); Alaska Stat. §§09.25.150-.220 (1983 & supp. 1984); Ariz.Rev.Stat.Ann. §12-2237 (1982); Ark.Stat.Ann. §43-917 (1977); Cal.Evid.Code §1070 (West Supp.1985); Del.Code Ann. tit. 10, §§4320-4326 (1974); Ill.Ann.Stat. ch. 110, §§8-901 to -909 (Smith-Hurd 1984); Ind.Code Ann. §34-3-5-1 (Burns 1973 & Supp.1984); Ky.Rev.Stat.Ann. §421.100 (Baldwin 1979); La.Rev.Stat.Ann. §§45:1451-1454 (1982); Md.Cts. & Jud.Proc. Code Ann. §9-112 (1984); Mich.Comp.Laws Ann. §767.51 (West 1982); Minn.Stat. §§595.-021-025 (1982); Mont.Code Ann. §§26-1-901 to -903 (1983); Neb.Rev.Stat. §§20-144 to 147 (1977); Nev.Rev.Stat. §49-275 (1981); N.J.Stat. Ann. §2A:84A-21 to -21.9 (West Supp.1984-1985); N.M.Stat.Ann. §38-6-7 (Supp. 1984); N.Y.Civ.Rights Law §79-h (McKinney 1976 & Supp. 1984-1985); N.D.Cent.Code §31-01-06.2 (1976); Ohio Rev.Code Ann. §§2739.04-.12 (Page 1981); Okla.Stat. tit. 12, §2506 (1981); Or.Rev.Stat. §§44.510-540 (1983); 42 Pa.C.S. §5942 (1982); R.I.Gen.Laws §§9-19.1-1 to -3 (Supp. 1984); Tenn.Code Ann. §24-1-208 (1980).

'ultimate' in news media protection; that is, the press has a seemingly unassailable privilege not to disclose the source of any information obtained in the course of employment." *Jamerson, supra,* 469 N.E.2d at 1248 & n. 3. This preference for and continued endorsement of the privilege in this Commonwealth is evidenced by the Legislature's re-enactment of the 1937 statute without substantial change in July of 1976. See note 2, *supra; Hatchard, supra; Jamerson, supra;* see also *Coughlin, supra,* 603 F.Supp. at 380 n.3.

We are unpersuaded by the course taken by some sister states in this sensitive and always volatile cauldron of the law.[6] We think it prudent to maintain the status quo, i.e., use of the Shield Law and evidence related thereto, which has been viewed by the United States Supreme court in *Hepps* without any voiced objection by a majority of that court.[7] Our approach is no less inimical to the plaintiff than presently exists under *Hepps.* This is reflected in the cogent observations of Circuit Judge Becker in his Concurring Opinion in *Coughlin:*

> . . . although the Shield Law affects the *manner* in which plaintiffs [sic] may develop evidence to support his defamation claim, it does not make successful defamation claims impossible. Plaintiff may use other evidence, both direct and circumstantial, to substantiate his claim. Admittedly, the plaintiffs' [sic] case is made much more difficult by the

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6. There is anything but consistency as to the ramifications that flow from the refusal to disclose one's source. See *Greenberg v. CBS, Inc. supra; Dowd v. Calabrese,* 577 F.Supp. 238, 244 (U.S.D.C.1983), both of which attempt to solve the dilemma without going to the extreme of presuming the non-existence of sources, as has occurred with two non-shield states – New Hampshire and Hawaii. See *Downing v. Monitor Publishing Co.,* 120 N.H. 383, 415 A.2d 683 (1980); *DeRoburt v. Gannett Co.,* 507 F.Supp. 880, 884 (D. Hawaii 1980); Cendali, Note: Of Things to Come – The Actual Impact of *Herbert v. Lando* and a Proposed National Correction Statute, 22 Harv.J.Legis. 441, 460-63 (1985).

7. This position, we believe, is buttressed by the fact that the 5-member majority in *Hepps* was not swayed by the argument of the dissenters, which is similar to the complaints voiced by the plaintiff here, that "[l]ack of knowledge about third parties . . . may make it impossible for an honorable person to disprove malicious gossip. . . ." 106 S.Ct. at 1569.

> Shield Law, but that reflects a choice by the state legislature that it is not within our power to upset.

780 F.2d at 349 (Emphasis in original). See also *Samuelson v. Susen,* 576 F.2d 546, 553 (3rd Cir.1978) ("No doubt the statutory provisions affect the manner in which plaintiff may develop evidence to support his defamation claim. Plaintiff is not, however, foreclosed from prosecuting his claim with other evidence, both direct and circumstantial." Cited with approval by the District Court in *Coughlin, supra* at 382). In addition, we see merit in the suggestions of PNI in its brief to us at page 48, wherein it wrote on the subject that:

> The proper course . . . would have been to permit the reporters to testify, and be cross-examined, about all information they had at their disposal prior to publication of the articles in suit. To the extent that the reporters declined to identify the sources for certain portions of the information they had obtained, the jury would be called upon, as it is in all cases, to gauge the credibility of the witnesses and their testimony based upon the tests of credibility to be applied to the testimony of any witnesses. Thus, the jury would be free to believe or disbelieve the reporters' testimony concerning the existence and reliability of confidential sources.

We are not insensitive to the position of the plaintiff, given his status as a "public official" for purposes of this case and the attendant heavy burden placed upon him by *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), considered difficult, if not impossible, to discharge by some. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* ____ U.S. ____, ____, 105 S.Ct. 2939, 2951, 86 L.Ed.2d 593 (1985) (Concurring Opinion of Justice WHITE). Our decision is made all the more difficult because of the countervailing forces at work, each trying to protect and preserve whatever liberty and property interests remain in the wake of *Sullivan* and the Shield Law. Nonetheless, make one we must.

[5] Mindful that freedom of the press is a fulcrum upon which some of our cherished liberties hinge, we have considered

the well-written briefs of both sides, the thoughtful and incisive opinion of the court en banc and conclude that, at least in this jurisdiction, the statutory and case law condone the use of testimony to explicate when, where and how information is garnered without the correlative requirement of source-disclosure by a back-door approach excising evidence from a trier-of-fact's consideration for failure to identify one's artery of information. To remedy the error of law, a new trial is warranted.

We next proceed to evaluate the denial of PNI's judgment n.o.v.

> Our task is to make an independent[8] examination of the evidence adduced to determine if it was constitutionally sufficient to warrant a finding by the jury of actual malice, and in so doing, the evidence, together with all reasonable inferences therefrom, must be considered in the light most favorable to the verdict winner, here the plaintiff. If it is not sufficient, [the defendant] is entitled to judgment n.o.v.

Corabi v. Curtis Publishing Co., 441 Pa. 432, 458, 273 A.2d 899, 912 (1971).

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8. As stated more fully in the recent case of *Bose Corp. v. Consumers Union of United States, Inc.* 466 U.S. 485, 510-11, 104 S.Ct. 1949, 1965, 80 L.Ed.2d 502 (1984):

> The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common law heritage. It reflects a deeply held conviction that judges — and particularly members of this Court — must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

See also Monaghan, Henry P., Constitutional Fact Review, 85 Colum.L.Rev. 229 (1985).

[6-8] Before proceeding further, it requires mentioning that Sprague's position as First Assistant District Attorney for Philadelphia County in 1973 rendered him a public official. *Curran v. Philadelphia Newspapers, Inc.*, 497 Pa. 163, 439 A.2d 652 (1981). Accordingly, the plaintiff, in order to recover, had to establish that PNI published[9] the complained-of articles with actual malice, i.e., with knowledge that they were false or with reckless disregard of whether they were false. *Sullivan, supra; Corabi, supra; Curran, supra.*

The material which the jury found to be legally offensive would appear to begin with *The Inquirer* publication of March 25, 1973, written by Greg Walter and titled; "Ex-Official Denies Report Linking Sprague to 'Pratko', with a follow-up caption — "Report Linking Sprague, 'Pratko' Is Denied" — appearing on another page carrying a continuation of the story.[10]

Of the twenty-two paragraphs in the article, four specifically made reference to either Sprague or a named, former Justice Department official denying that he (Sprague) was using the alias "Nicholas Pratko", a name which surfaced during the court-martial of three State Troopers charged with wiretapping the phones of the Pennsylvania Crime Commission's investigation of purported police corruption in Philadelphia. "Pratko" was to have been in constant contact with the former State Police Commissioner, Rocco Urella, Sr.

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9. No one disputes that the reporters under fire were employed by PNI, that the executive editor personally reviewed with Pollock the basis for the articles and came away convinced of the truthfulness of the contents with regard to Applegate. Therefore, it cannot be argued that PNI is immune from liability for the actions of its agents/employees/reporters. See *Catalfo v. Jensen*, 628 F.Supp. 1453, 1455 (D.N.H.1986) (". . . every person who directly or indirectly publishes or assists in the publication of an actionable defamatory statement is liable for the resultant injury." (Citations omitted)); see also *Michaelson v. Exxon Research & Engineering Co.* 629 F.Supp. 418, 422 (W.D.Pa.1986) (Principal is liable for defamation so long as agent was apparently authorized to make defamatory statement).

It cannot be discounted that at one stage of the trial, even defendant's attorney agreed with the trial court that ". . . knowledge of Greg Walter [is] the knowledge of Philadelphia Newspapers, Inc."

10. See Appendix.

The connection with Sprague came by way of a report prepared by a State Policeman attached to the Crime Commission (Sgt. Matthew Hunt). The report detailed that, according to informed sources, a telephone operator at the State Police Academy volunteered that " 'Pratko' was Richard Sprague."

Two days later, *The Inquirer* carried a story by Howard S. Shapiro – "Witness Ties Sprague To Mystery Figure in Trooper Wiretap Case"[11] – tying Sprague to "Pratko" through Sgt. Hunt's testimony at the court-martial proceedings. He was to have stated that a confidential source told him that "Pratko" was thought to be Sprague. In the second column of the article, it was reported that Sprague "vigorously" denied any link to "Pratko".

On March 31, the same reporter wrote a sequel in which he noted that a decision on the court-martial would be forthcoming. He also recounted how Sprague had been mentioned by Sgt. Hunt as using an alias in the registration of a vehicle found at the motor lodge where the wiretapping took place.[12]

A second set of articles was preceded by an exchange of communiques beginning with a March 14, 1973 telegram asking Sprague interrogatories regarding the death of John Applegate. The next day, Sprague responded to the executive editor (Eugene L. Roberts, Jr.) of *The Inquirer* that his prosecution of one of the Yablonski murder cases rendered it "impossible" to answer the detailed questions posed by Pollock and Walter. He also mentioned his prosecution of Walter, the pending appeal thereof, and reports from "reliable" individuals that the reporter was "out to get" and "smear" him. He did state, however, that upon completion of his work he would answer any questions.

A second telegram, dated March 16, consented to a delay. Sprague responded by letter on March 28. In it he reasserted that Walter was out to "smear and destroy" him, and those individuals who were present when these remarks were allegedly made were named. He also referred to the "Pratko" serials. In closing, he denied any wrong-doing in the handling of the

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11. *Ibid.*
12. *Ibid.*

Applegate matter, and was willing to have it examined by an "impartial, independent individual."

In answer, Roberts wrote on March 29 that Walter's involvement in the story would be to "aid" Pollock, with the writing reserved to Pollock. Roberts also stated how the prosecution of Walter had been questioned by *The Inquirer* and how Sprague's feeling, that a reporter once charged should not participate in a story about his prosecutor, caused him "concern."

The next salvo came from Sprague. He responded in a letter of even date that his purpose was to convey the possible motivation behind Walter's "malicious" statements, and, as for Pollock's fitness, he concluded not to allow Pollock an interview either, after being advised by one of his contacts that Pollock had said: " . . . we are out to get Sprague." As a result, Sprague's willingness to be interviewed would have to occur in the absence of both Pollock and Walter.

Roberts' retort was in the form of a second letter in as many days that to acquiesce to a public official's objection to a specific reporter covering a story would be to render the official a "de facto" editor of *The Inquirer*. This he could not approve.

Roberts repeated his request that Sprague submit to questioning by Pollock and, this time, one Aaron Epstein. If there was no reply, whatever story had been prepared would be run with a notation as to Sprague's reasons for declining to talk.

True to his work, *The Inquirer* published thereafter two articles, both under the byline of Pollock and Walter. The first, printed on April 1, was headlined: "Did Sprague Quash Homicide Case as Favor to Urella?" "Sprague, Urella Tied to Wiretap, Homicide Cases."[13]

The introductory paragraphs to the approximately two-and-one-half page, five-column story intermingled the "Pratko" incident with the Applegate homicide. It then proceeded to "link" Sprague and Urella, Sr. to the wiretap incident, with a denial by Sprague. The article then discussed what transpired subsequent to Applegate's death, e.g., Sprague's late-night

13. *Ibid.*

drive with Urella, Sr. to police headquarters and his participation with police in deciding not to prosecute Urella's son. Continuing, the writers recited in detail the facts surrounding the homicide, as garnered from those present and a so-called "official report" attributed to Sprague, to which repeated references were made as being deficient when compared to and inconsistent with respect to the witnesses' accounts of the incident.

The article described Urella, Jr.'s roommate's discharge at the magistrate hearing as coming at Sprague's urging. And, it was reported that Sprague boasted after the homicide to one of his friends, who gave a sworn statement of the same to *The Inquirer*, that "he 'could get anything [he] want[ed] from Rocco Urella.' "

The second *Inquirer* story of note appeared April 2, and sought, again, to associate Sprague with the wiretapping controversy surrounding Urella, Sr.[14] In the second and fifth paragraphs, according to sworn testimony given before the Crime Commission by a receptionist in Urella's office, Sprague was "in constant touch" with Urella.

The other article and editorials in *The Inquirer* add little to the manner in which Sprague was portrayed in the writings already discussed. Thus, although we will not make specific reference to them, we nonetheless, are cognizant of their existence.[15]

At trial, Sprague attempted to prove that the articles and headlines cited were false, that PNI was aware of their falsity or, in the alternative, acted in reckless disregard of their truth or falsity by failing to determine their accuracy.

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14. *Ibid.*

15. The April 4, 9, 10, 19 & 28 editorials, as well as an April 8 article ("Sprague Releases Part of Death File To Defend Actions"), are objected to as false and defamatory in plaintiff's amended complaint. However, our reading of the record would seem to discount the reliance on these writings by the plaintiff as ammunition in his arsenal of evidence to prove "actual malice." Rather, we find that the *thrust* of the plaintiff's defamation case centers upon the articles appearing in *The Inquirer* on March 25, 27, 31 and April 1 of 1973.

While Sprague was on the stand, he denied any involvement in the "Pratko" affair or engaging in any impropriety with regard to the Applegate case. In particular, Sprague, in reference to the April 1 article, denied the existence of any "Sprague report" and refuted the non-existence of homosexual charges against Applegate by quoting from the summarization sheet in the Philadelphia police homicide file (criminal extract #260719) containing a conviction for sodomy in 1953 and a 1960 charge of solicitation that was still outstanding as of the time of Applegate's demise. The file also disclosed, contrary to the same article, that Urella, Jr. and Funk (Applegate's roommate) were administered lie-detector tests and passed.

Sprague steadfastly maintained that at no time did he try to cover-up Applegate's death, which was preceded by an innocent meeting of the victim by Urella, Jr. and Scalessa in a bar. A subsequent trip to the victim's apartment, under the pretext to secure a woman and more alcohol, ended in Scalessa striking him on the face for making a homosexual remark and lunging at Scalessa to prevent departure.

Sprague stated that because in his own mind he questioned whether Scalessa was saying he threw the punch at Applegate to protect Urella, Jr., he requested they take lie-detector tests, and, also, that LaSalle students be asked what Scalessa might have said to them regarding the incident before the news of the death became public. This was done and a pattern of consistency emerged supportive of who struck Applegate, i.e., Scalessa and not Urella.

As for the specific content of the April 1 article, to which reference has not already been made, Sprague denied that: 1) he "declined to prosecute" Urella; 2) he recommended no prosecution "despite objections by the police"; 3) he was in "constant touch" with the then Commissioner Urella as to the investigation being conducted by the State Crime Commission; 4) he was "in conference" an entire day with Urella at Urella's Delaware County home four days after the wiretaps were discovered; 5) he refused to be interviewed by *The Inquirer;* 6) unanswered questions existed about Applegate; 7) in 1971 he was a Special Crime Commission Investigator in Delaware

County to look into corruption after Urella left office; and 8) he "urged" magistrate to discharge Scalessa – only "recommended". Lastly, as for Urella's late-night drive of Sprague to the police station, Sprague had no specific recollection.

As for the "Pratko" connection, Sprague produced an April 5 news release issued by the executive director of the Pennsylvania Crime Commission disavowing any knowledge by the Commission that "Pratko" was an alias of Sprague's. To the same effect, a letter from the Commissioner of the Pennsylvania State Police indicated that a conversation with Sgt. Hunt had produced no information to the contrary.

In an accompanying letter, Sgt. Hunt recounted how he had been "abruptly interrupted" at the court-martial proceedings, wherein he made a mention that a confidential informant "thought" that Sprague was possibly utilizing the code name "Pratko", so as not to be able to elaborate further that he had personal knowledge of who "Pratko" was, and that it was not Sprague.

To place matters in perspective, it requires mentioning that in 1972 the Commission was investigating the Philadelphia police department, and Sgt. (now Lieutenant) Matthew E. Hunt – working for the State Attorney General – was field supervisor for the Commission's agents looking into corruption in the City of Philadelphia. One of his duties related to the now ill-fated wire-tapping incident of the Commission's agents in a Montgomery County motor lodge that resulted in the court-martial of three state troopers.

Furthermore, Officer Edward J. Brooks, in charge of investigating Applegate's death, stated that Sprague did nothing to "interfere" with the case or the conclusions he drew from the evidence. As he remarked, there was only one thing different Sprague did that had not been done before, i.e., he asked that Urella, Jr. and Scalessa be given a polygraph. In 1963, it was the practice of the police that where an individual admitted to the commission of a crime, one could "almost positively" say that "you didn't polygraph." Yet, Sprague went that additional step.

Harry G. Fox, Chief Inspector of Detectives in 1963, echoed Brook's sentiments that Sprague made no effort to influence the investigation or his decision-making. He did offer that because everyone knew Urella, Sr., they tended to do "something more than we do ordinarily." He opined that if Urella, Jr. had not been the son of a policeman, he would not have been arrested, and probably, Scalessa would not have been arrested either because, basically, of the recommendation of the assistant district attorney, Sprague.

Both witnesses agreed that a right to re-arrest existed but was not exercised following Scalessa's discharge by the magistrate.

Upon the evidence presented, the trial court determined initially, as it was obligated to do under the law (see *Corabi, supra*), that the "Pratko" and Applegate publications were susceptible to a defamatory meaning. The jury's verdict reflects a concurrence.

We have no quarrel with the preceding conclusion, nor with the finding of falsity as to Sprague's involvement in the "Pratko" episode or his "quashing" of the Applegate case as a favor to Urella.

[9] Having determined that the printed word was both false and defamatory, we need to decide whether PNI was guilty of doing so with "acute malice." See Concurring Opinion of Justice WHITE in *Dun & Bradstreet, Inc., supra,* 105 S.Ct. at 2949, citing *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) and *Sullivan, supra.* The task is not an easy one, and never has been since *Sullivan,* in striking a balance between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputations.

The United States Supreme Court has given us some direction in this area in its recent decision of *Bose Corp., supra.* It wrote there:

> The burden of proving "actual malice" requires the plaintiff to demonstrate with clear and convincing evidence

that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement. See, *e.g.*, *New York Times v. Sullivan, supra,* 376 U.S., at 280, 84 S.Ct., at 726; see also *Gertz v. Robert Welch, supra,* 418 U.S., at 342, 94 S.Ct., at 3008; *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968); see generally W. Prosser, Handbook on the Law of Torts 771-772, 821 (4th ed. 1971).

466 U.S. at 511 n. 30, 104 S.Ct. at 1965 n. 30.

[10] to start with, after culling the relevant adjudicative facts, we have been unable to uncover "clear and convincing" evidence that PNI had knowledge that what it published was false. We are left, therefore, as phrased most aptly by Sprague's counsel early on in the trial as the parties met in chambers, with "the issue [of] whether they acted in reckless disregard of the truth." See *Sullivan, supra,* 376 U.S. at 280, 84 S.Ct. at 726; Anno., Libel and Slander: What Constitutes Actual Malice, Within Federal Constitutional Rule Requiring Public Officials and Public Figures to Show Actual Malice. 20 A.L.R.3rd 988, 4[a].

Federal cases have provided guidance to the states in defining a "reckless" publication. In *Garrison v. Louisiana,* 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), the necessity for showing that "only those false statements made with the high degree of awareness of their probable falsity demanded by [*Sullivan*]" was emphasized. 376 U.S. at 74, 86 S.Ct. at 216. "Reasonable-belief" was not equated with the "reckless-disregard-of-truth" standard. The test enunciated by *Sullivan* is not that of ordinary negligence; and defeasance of the privilege is conditioned, not only on negligence, but also on reckless disregard for the truth. *Id.*, Anno., 20 A.L.R.3rd 988, 4[a] at 998-99.

The most expansive effort to elaborate on the scope of "reckless disregard", as applied to the First Amendment dissemination of information, came in *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). The Court

admitted that the perimeters of the phrase just mentioned would evolve through a case-by-case adjudication. It then proceeded to discuss:

> Mr. Justice Harlan's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094 (1967), stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These case are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

390 U.S. at 731, 88 S.Ct. at 1325. An example of the manner in which the "reckless " standard is to be applied is reflected in *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

Hill dealt with an article in Life Magazine about a family being held hostage by convicts, which, according to the article, became the subject of a novel and subsequent play. In the article, members of the Hill family were depicted as physically and sexually abused. However, an interview with Mr. Hill stressed that their captors treated them courteously.

Life's article became the subject of a suit premised upon a New York statute which gave a person a right of action when his name (used to promote the sale of goods without proof of consent) was the subject of a "fictitious" report or article.

Of interest i the Supreme Court's reference to a Court of Appeals' decision in that state as an aid to understanding the construction being given to the statute. In the course of analyzing that ruling, the *Hill* Court observed that minor errors did not constitute "fictionalization". According to the State's highest court, *material and substantial* falsification was the test.

It is germane that the United States Supreme Court did not equate "material and substantial knowledge of the falsity or that the article was prepared with reckless disregard for the truth," which it unequivocally stated "is also required." 385 U.S. at 386-87, 87 S.Ct. at 541. To the extent New York's highest court endorsed another (lesser) standard of proof, *Hill* found it to be inconsistent with the constitutional protection afforded the press and speech alike.

Time, the publisher of Life, defended on the basis that the article was of legitimate public interest and was published in good faith without any, malice whatsoever.

At trial, the author denied that he had knowledge from the start that the play had no connection to the Hill situation, aside from being a hostage incident. Although stating that the play was "between a little bit and moderately fictionalized", the author thought that the "heart and soul" of the play was the Hill incident. Albeit reversing for the trial court's injection into its instructions the element that liability could be premised upon "some incidental mistake of fact, or some incidental incorrect statement", the *Hill* Court did observe:

> The jury might reasonable conclude from this evidence—particularly that the New York Times article was in the story file, that the copy editor deleted "somewhat fictionalized" after the research assistant questioned its accuracy, and that Prideaux [the Life writer] admitted that he knew the play was "between a little bit and moderately fictionalized"—that Life knew the falsity of, or was reckless of the truth in, stating in the article that "the story reenacted" the Hill family's experience. On the other hand, the jury might reasonably predicate a finding of innocent or only negligent misstatement on the testimony that a statement was made to Prideaux by the free-lance photographer that linked the play to an incident in Philadelphia, that the author [of the novel and play] Hayes cooperated in arranging for the availability of the former Hill home, and that Prideaux thought beyond doubt that the "heart and soul" of the play was the Hill incident.[11]

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11. Where either result finds reasonable support in the record it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood. Cf. *New York Times Co. v. Sullivan*, supra, 376 U.S. 284-285, 84 S.Ct. 728-729, 11 L.Ed.2d 686.

385 U.S. at 393-94 & n. 11, 87 S.Ct. at 545 & n. 11; cf. *Anderson v. Liberty Lobby, Inc.*, ____ U.S.____, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (Role of jury in libel case reaffirmed (i.e., weighing of the evidence and drawing of legitimate inferences from the facts) once trial court determines that a reasonable factfinder could conclude that plaintiff has shown actual malice (in the pleadings) with convincing clarity sufficient to overcome a motion for summary judgment under Fed.R.Civ.P. 56(c)).

With the preceding in mind, we will examine a trio of "Pratko" articles. The first was written by Walter on March 25, 1973 and, in the headline, denied any connection between Sprague and "Pratko" on the word of an ex-official.

In the body of the article, no less than seven (7) references are made to Sprague not being "Pratko." When the story does discuss two names as being the same person, it does so in respect to a report written by Sgt. Matthew Hunt.

Neither Sgt. Hunt, nor the attorney who cross-examined him at the court martial, denied the elicitation of testimony that a confidential informant (telephone operator) had told Hunt that the name "Pratko" was being used by Sprague. Hunt also admitted in January of 1973 he gave a routine statement to State Police investigators that he had a source who believed Sprague to be "Pratko." This statement/report was used to cross-examine Sgt. Hunt on the existence of a confidential informant linking Sprague with "Pratko" – Hunt admitted to this "reluctantly" at the court-martial, and testifying thereto only after being ordered to do so by the review board.

[11] Based on what was said and in light of what was written, we fail to detect how the newspaper's qualified privilege, in giving an accounting of a court-martial proceeding, was lost in the absence of "clear and convincing" proof that anything other than a "summary of substantial accuracy" was reported.

See *Curran, supra; Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 275 A.2d 53 (1971); *McAndrew v. Scranton Republican Pub. Co.*, 364 Pa. 504, 72 A.2d 780 (1950); Restatement (Second) of Torts, §611.

We see no reason why the same qualified privilege would not apply to the second "Pratko" article of March 27, provided, of course, it was "a substantially correct account of the proceedings." Restatement (Second) of Torts, §611, Comment *f.* We find it to be so.

We see that the introductory paragraph depicted Sgt. Hunt as "reluctantly" linking Sprague with "Pratko", a matter of which we have already made note, and corroborated by the attorney who extracted the admission at the hearing. The second paragraph recounted Hunt's testimony of his informant that Sprague was "Pratko", a fact that did transpire at the hearing, but which in the remaining article was off-set by accounts that a trooper had assigned a vehicle under the alias of "Pratko" to Corporal Metro Kardash, that the informant's statements were hearsay and maligning by inference, and Sprague's "vigorous" denial.

We have read the testimony of Sgt. Hunt, against the story printed, and do not find evidence of "actual malice" on the part of PNI in its March 27 publication.

As for the March 31 article, Howard S. Shapiro, who penned the second article, admitted there was an inaccuracy between his "hard" copy and the story which appeared in the paper.

His original read: . . . Hunt . . . linked Sprague's name to *an alias who allegedly* is registered to the unmarked State Police car used in the bugging incident." (Emphasis added) The actual article provided: " . . . Hunt said Sprague *allegedly* had used an alias in the registration of an unmarked State Police car linked to the bugging incident." (Emphasis added) According to Sgt. Hunt's testimony at the trial: "The second paragraph is false."

Further, Sgt. Hunt and Paul C. Van Grossi—Trooper Metro Kardash's attorney at the court-martial, confirmed that a Trooper Kury, whose job it was to issue and keep track of vehicles assigned to undercover troopers, testified at the hearing that Kardash was issued a vehicle in the name of "Pratko".

Interestingly enough, this was cited in Shapiro's March 27 article, along with the fact that the police found at the wiretap location a type of vehicle (a coupe) that had been registered to "Pratko." Neither fact was discussed in the later article.

Additionally, Shapiro said he had juxtaposed "hearsay evidence" with "Richard Sprague." Again, this was not published in the final article.

When Shapiro was asked at the deposition why he did not mention Sprague's denial in the March 31 writing as he had in the March 27 piece, he responded: "I did not put that denial in that story, and I don't know why." Moreover, the deponent-Shapiro agreed with plaintiff's attorney that the changes made by the city editor the day of publication were "significant", and, in the case of the re-write of "allegedly" by the same man, that was tantamount to "an inaccuracy".

[12] We have no hesitancy in holding that the actions of PNI (through its agents/servants—copy editors and Shapiro) are not synonymous with innocent or negligent misstatements.

The originator of the March 31 article used *specific* language to convey his thoughts of what transpired at the court-martial hearing. The re-write, which excised "hearsay" and realigned "allegedly", connotes a meaning other than that initially intended.[16]

[13] Instantly, unlike *Time, Inc. v. Hill, supra,* the trial court did properly instruct the jury that the determination of liability had to be premised upon "clear and convincing" evidence of a knowing or reckless falsity. As acknowledged and approved by *Hill,* we find it was for the jury to decide, under the particular facts here, whether the conduct of PNI (deletions,

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16. *Corabi, supra,* 441 Pa. at 466, 273 A.2d at 916 (". . . . the passages selected for deletion and modification, even though sometimes small, can cause a dramatic change in the impression which the final article will generate in the minds of the average reader. And these editing decisions are calculated ones made by the editors to comport with the tone of the magazine desired."); see also *Time, Inc. v. Pape,* 401 U.S. 279, 292, 91 S.Ct. 633, 640, 28 L.Ed.2d 45 (1971) ("Nothing in this opinion is to be understood as making the word 'alleged' a superfluity in published reports of information damaging to reputation.").

re-writes and omissions) altered the substance of the article of March 31 so as to rise to the level of "reckless" conduct violative of the counter-vailing right of a public official to his good name/reputation.[17]

Likewise, we conclude that it was for the jury to decide whether the April 1-2 articles were written with reckless disregard for the truth.

To explicate, the Applegate coverage had its genesis in December of 1972 when Walter received a "tip" that Sprague, ten years previously, had "covered-up" Urella's son's involvement in a murder case. During this same period, Walter had been dismissed by one paper and hired by *The Inquirer,* whose executive editor decided to move with "force" on this.

Walter's deposition reveals that once he located Applegate's roommate (Funk) in February of 1973, a tapped conversation took place, and was followed a month later by a phone interview to double-check the accuracy of the earlier meeting. Walter stated Funk was consistent on both occasions, i.e., Urella went into the bedroom with Applegate, and, when Urella came running out, Scalessa was on top of Funk, hitting him. Nowhere is this documented. In fact, this was countered by Scalessa's March 5 interview by Walter which placed Urella with him in the living room during the entire episode.

Prior to finding Funk, Walter interviewed Applegate's daughter (Nancy DeAngelis) and was informed that an aunt (Lillian, now deceased) had once mentioned that her father had "homosexual difficulties as a young man." This was consistent with the article that appeared in the March, 1963 edition of the *Evening Bulletin,* where it was written that Applegate had been convicted of sodomy in 1953 and was awaiting trial on a charge of solicitation to commit sodomy in 1960. This clipping was in PNI's file, known by the acronym RUDS (Rocco Urella – Dick Sprague).

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17. Cf. *Time, Inc. v. Pape, supra,* 401 U.S. at 285, 91 S.Ct. at 637 (". . . issue of malice was consequently one for the jury . . . when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves.").

PNI's efforts to secure local, state or federal confirmation of any conviction proved unsuccessful. However, the summary sheet in Applegate's criminal extract, which was read to Walter during his interview of the record's officer, documented this fact quite clearly. Also, the *Bulletin* reported that Urella and Scalessa had taken lie-detector tests. This was doubted by *The Inquirer,* and its inability to confirm this fact caused it to be questioned in the April 1 article.

Scalessa was interviewed on March 5, 1973 in Maryland, and he admitted to Walter that he hit Applegate. He was also interviewed on March 10, this time by phone. Scalessa was asked why he would have admitted to killing Applegate when it was clear that he did not. This conversation was reproduced in the April 1 article, and was conceded by Pollock as implying that Scalessa at some time had confessed to the homicide when, in actuality, that never occurred. At trial, Pollock stated that the question posed was somewhat "unfair." Further, Funk never accused Scalessa or Urella of murder.

Walter had stated he secured a statement from Funk, during the personal interview in New York, that Urella killed Applegate. Nowhere in Funk's deposition is there any discussion that either murdered Applegate, and, inexplicably, the tape-recording of the conversation with Funk could not be found by Walter. Nor did Walter's notes of the interview document this accusation.

Walter also disbelieved Scalessa's March 5 statement that he struck Applegate, and that he and Urella "were confronted with homosexuality" in the apartment because Walter believed Scalessa was made the "fall guy".

[14] Scalessa, according to Walter, at some point said that Urella hit Funk. This was crucial in Walter's mind since Sprague had not prosecuted Urella because there was no evidence that he struck anyone. However, Funk had never said that he had contact with Urella; he said he was hit by Scalessa. Nonetheless, Walter discounted Funk's recollection in this instance because Funk had been drinking on the evening in question. Yet, Walter placed reliance on Funk's story, which indicated to Walter that

Urella struck and killed Applegate, because he "believe[d] the man." Is this evidence of selective news-reporting?[18]

Roberts was on the stand for over four days, and during that period, he recounted poring over the April 1 article paragraph by paragraph, and being convinced by Pollock's recitation of the sources for the statement(s) that the story was accurate. He offered that his only objective in circulating the article was to bring to the forefront what he perceived to be the questionable conduct of Sprague's handling of a case in which Sprague knew (was "very close" friends with) the father of one of the participants.[19]

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18. We wish to lay one item to rest here. There were repeated accusations made and substantiated that Walter had a "vendetta" against Sprague, and he was "obsessed" with seeking retribution for the wiretapping conviction he had suffered at the hands of Mr. Sprague. Nonetheless, not one of the witnesses presented by the plaintiff could state that Walter intended to accomplish his deed by fabrication/falsehood. Thus, regardless of Walter's motive, such evidence would not transform itself into "actual malice." As the Supreme Court of the United States has observed:

> [u]nder a rule . . . permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, 'it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.' Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875, 898 (1949).

Garrison v. Louisiana, 379 U.S. 64, 73-74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964). See *Henry v. Collins*, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965).

19. Is it not ironic that the paper would feel inhibited in the exercise of its discretion as to who should write an article when a reporter was objected to by a prospective interviewee as knuckling under and having others dictate the paper's reporting practices. Yet, the paper, in particular Walter, believed there was something inherently improper about an assistant district attorney prosecuting/investigating a case involving someone he/she knew, especially when the outcome was one of non-prosecution of the suspect. We sense a double-standard. On the one side of the press is to have unbridled authority in the operation of its paper, as one of the penumbra of rights afforded by the First Amendment. On the other side, however, public officials are to be held up to public scrutiny with little recourse for publications of falsely or recklessly produced articles.

As to the fabled "Sprague's official report", Roberts could not remember whether Pollock showed it to him. Roberts did believe that if Pollock had shown him a "piece of paper" and stated it to be the "Sprague official report", he would have felt that Sprague would have been entitled to an apology for associating his name to a document that had been repeatedly referred to in the April 1 article as woefully insufficient in substance and rebutted by reference to other evidence tending to cast a cloud of impropriety on Sprague's conduct in seeking and obtaining a dismissal of criminal action against Scalessa and Urella.

Roberts acknowledged that he had no reason to doubt the veracity of the *Bulletin* story of 1963 recounting the events surrounding the Applegate case, e.g., giving of lie-detector tests to Scalessa and Applegate, Funk not recalling falling down or being knocked over, and Sprague "recommending" there be no arrests. Curiously, Roberts stated that at no time did he or anyone from *The Inquirer* attempt to contact the *Bulletin* reporter responsible for the 1963 story. We refer to this merely as an aside, for we are quite well aware that what a defendant did, as compared to what it did not do, is the measuring rod against which its conduct is to be assessed. See *Sullivan, supra.*

While Pollock was on the stand, he gave information relating to the content of the RUDS file, and what he relied upon in writing about Applegate.

Pollock stated that he knew that the March 31 story was false, and he tried to rectify the matter in his April 2 article. When he denied that he had knowledge prior to the March 25, 27 or 31 articles that Sprague was not "Pratko", it was pointed out that he wrote a January 7, 1973 article (headlined: "Despite Denial, Urella Had Wiretapping Evidence") in which it was reported "Urella told Crime Commission investigators that Pratko was the undercover name of Metro Kardash." No mention of this was made in the April 2 article.

At the time Pollock wrote the April 1 article, he stated that he did not know that Applegate was a homosexual. This is refuted by the record. For example, No. 27 in the RUDS file covered a notation about a Mr. Laughran, i.e.,

> Called the Norfolk Apartments, Clearview Ave., spoke with Mr. Francis H. Laughran, owner. Very cooperative. His records show Franklin P. Funk and Applegate rented a sixth-floor apartment. He says it was general [sic] thought that the two men were homosexuals.

According to Pollock, the aforesaid was in the file, and "it would have been in February, probably, of 1973." Next, one of Applegate's two children told the reporters that her aunt informed her about homosexual problems encountered by her father during his childhood. Lastly, as for Applegate making a homosexual advance to either Urella or Scalessa, Pollock stated: "Mr. Scalessa had told us that that was the case, yes, sir. I believe it was also information contained in the March, 1963 Bulletin article." Notwithstanding this, Pollock included the following in the April 1 story: "But his death—along with the apparently untrue accusation that he had a record as a homosexual—was an extremely personal tragedy to his family."

There was evidence that only one of Applegate's children was interviewed regarding the homosexual charges which surfaced and were reported in the *Bulletin* in 1963. When confronted with the claim that what he wrote, based on what a single child had told him, was false, Pollock stated: "I wrote all the information I had; except, I grant you, this one particular point."

Pollock's attempt to render the matter innocuous by asserting that it was unintentional and an oversight was countered by Sprague's counsel by reference to Pollock's pre-trial affidavit, which was prepared by PNI's counsel:

> . . . that the article of April 1, 1973, w[as] believed by me to be true and correct, and I possessed no knowledge, nor any reason whatsoever to doubt the truth of any part of the aforesaid article.

In another instance, we observe that in one paragraph of the news article at issue, Pollock wrote:

> Urella's son and a LaSalle College classmate were involved in a 1963 fight that led to the beating death of a forty-eight-year-old man, but Sprague recommended there be no prosecution despite objections by police.

When plaintiff's counsel inquired why the article reads as if the police "objected" to *both* (Urella's and Scalessa's) cases being dropped, the question posed was: "Did they [police] object to Mr. Sprague's recommendating that there was no basis for arresting Urella?" Pollock answered: "I don't know." He was asked further: "What objections did the police have with respect to Urella?" To this he responded: "None to my knowledge."

Nevertheless, Pollock persisted that the above-cited news article was to be read as: "There would be no prosecution of anyone, is what th[at] says, not that there was no prosecution specifically as to Urella." Thus, Pollock denied that he printed a known falsehood.

As to what "favor" was referred to in the legend: "Did Sprague Quash Homicide Case as Favor to Urella?", Pollock offered that:

> There was a legitimate, logical question as to whether or not Mr. Sprague had kept the lid on that investigation as a favor to Mr. Urella.

At page 181 of Pollock's 1975 deposition, the witness answered the same question differently; viz.:

> It is not now, nor was it then my suggestion that Mr. Sprague did any favor for Mr. Urella in order to receive favors in return.

Further, Pollock stated that in Scalessa's interview, he changed his story in response to questions asked by Pollock that it had earlier been reported that Rocco Urella, Jr. had not hit anyone. To this Scalessa answered: "Well, I don't know." This was not reported in the April 1 article, but it was in Pollock's notes. Additionally, in the article, Pollock wrote about Applegate telling Scalessa "he was not going to leave until he blew him", and then in the next paragraph Pollock asked Scalessa: "Did he (Applegate) seem to be like a homosexual?" The answer

was: "No." As to the approach taken by Pollock in his writing, the reporter did not dispute, on inquiry by the trial court and counsel for Sprague, that the way he wrote those two paragraphs were "misleading" as to Scalessa.

Lastly, Pollock acceded that the question put to Scalessa, and printed in the article, as to "Why did you say you did?"—referring purportedly to his admitting to killing Applegate on a prior occasion, was "a touch unfair."

[15] Based on the detailed accounting just recited, we believe the "actual malice" determination was a proper one for the jury. See *Time, Inc. v. Page,* 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971); *Time, Inc. v. Hill, supra; Bausewine v. Norristown Herald,* 351 Pa. 634, 41 A.2d 736 (1945). Thus, we affirm the denial of the judgment n.o.v.

[16, 17] The final two points we wish to make concern the following. First, the award of compensatory and punitive damages must bear a "reasonable relation" to each other,[20] as articulated by the trial court in its charge to the jury, and approved by this Court en banc (*Kirkbride v. Lisbon Contractors, Inc.,* ____ Pa.Super. ____, 516 A.2d 1 (1986)). In other words, punitive damages are still awardable upon a showing of knowing or reckless falsehood. See *Herbert v. Lando, supra,* 441 U.S. at 160 & n. 6, 99 S.Ct. at 1641 & n. 6, citing *Gertz, supra,* 418 U.S. at 350, 94 S.Ct. at 3012.

[18] Second, we adopt the position taken by Judge Carson, in his dissenting opinion, that the adverse inference was inappropriate, the simple reason being that there was no evidence that the absent witness (Walter) was anymore accessible to the defendant than he was to the plaintiff. Quite the contrary, in-chambers discussions indicated that Walter was in court at

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20. It notes mention that even the *Gertz* Court found that state-defined standards of liability for defamation would not be approved where: ". . . juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." 418 U.S. at 350, 94 S.Ct. at 3012. It cautioned that in only those instances where the *Sullivan* standard was met could one recover, in addition to damages to compensate a claimant for actual injury, punitive damages as well; anything less would entitle one to damages "to compensate him for actual injury" only. *Id.*

the direction of defendant's counsel, who was asked to make him available for questioning by plaintiff's attorney. This did occur, but the plaintiff never exercised his opportunity to inquire of the witness when he had the occasion to do so. He will not be heard to complain now. Moreover, Walter was deposed and his questioning generated over 450 pages of transcript. We would wonder what more could be asked of the witness that had not already been put to him during his deposition.

[19-21] In conclusion, finding that the Shield Law of this Commonwealth was violated by not applying it to the case at bar, we reverse and remand for a new trial.[21] Jurisdiction is not retained.

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21. Some of the remaining issues proffered by PNI relate to the adequacy of the trial court's instructions to the jury, i.e., 1) in not defining clear and convincing evidence as requested in PNI's point for charge number one; 2) in stating damages need be proved only by a preponderance of the evidence; 3) in not instructing that presumed damages could not be awarded absent clear and convincing evidence; 4) in not charging on nominal damages; and 5) by inadequately charging on punitive damages.

The trial court properly denied No. 1. Inasmuch as PNI's point for charge would have required that the evidence had to be "Free from doubt", this was a higher standard than that required in criminal cases. Thus, this was inconsistent with the intermediate level assigned to the clear and convincing standard by the United States Supreme Court in libel cases. See *Anderson v. Liberty Lobby, Inc.*, _____ U.S. _____, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (Clear and convincing standard falls between preponderance of the evidence and beyond a reasonable doubt criteria).

No. 2 would appear to be inconsistent with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), that state-defined standards of liability for defamation cannot fall below the "actual malice" criterion of *Sullivan* and still be held valid. Therefore, albeit *Gertz* dealt with a private-individual libel suit, we see no reason why the logic underpinning its application for awarding punitive damages would not justify its utilization in public official/figure cases, i.e., to prevent the unnecessary exacerbation of the danger of media self-censorship.

No. 3 is remedied by the instruction on clear and convincing evidence necessary to establish damages, which, by necessity, would negate the award of presumed damages. *Gertz, supra.* As for Nos. 4 and 5, we find them not to be meritorious.

Any other issues not otherwise specifically dealt with in our discussion are deemed, given the result reached instantly, not to warrant in-depth review.

APPENDIX

The Philadelphia Inquirer

Sunday, March 25, 1973

Ex-Official Denies Report Linking Sprague to 'Pratko'

By Greg Walter
Of The Inquirer Staff

Allegations that First Assistant District Attorney Richard A. Sprague was actually the mysterious "Nicholas Pratko" involved in the State Police wiretapping scandal were countered Saturday by a former State Justice Department official.

Walter L. Foulke, former executive deputy attorney general, said he had been told that "Pratko" was actually a code name for one of the three state troopers now being court-martialed on wiretapping charges.

"Pratko" has been mentioned at the court-martial as a code name used by someone who frequently contacted former State Police Commissioner Rocco P. Urella at his Harrisburg headquarters.

THE NAME has also been linked to an unmarked state police car found at the George Washington Motor Lodge in King of Prussia last Nov. 28—the day after wiretaps were found on phones of the State Crime Commission.

The car was registered under Pratko's name, according to Commission sources.

The suggested link between Sprague and "Pratko"—which Sprague has vigorously denied—was made at the court-martial by Norristown attorney Paul C. Vangrossi while cross-examining a witness.

Vangrossi represents one of the three troopers being court-martialed, Cpl. Metro Kardash.

According to Foulke, who resigned his Justice Department post at the start of this year, Kardash himself may have been "Pratko." Foulke told The Inquirer:

"IN FACT, Urella told me personally that 'Pratko' was a code name for Metro Kardash." He added that Urella had refused to sign a statement to that effect.

Besides Kardash, the defendants in the court-martial are Lt. Stephen Luchansky and Cpl. Curtis Guyette. The three were members of Urella's so-called "palace guard."

The allegations against Sprague, Foulke said, "must be mistaken.

"I know of no such report. Unless there had been other developments since the first of the year, there is no definite report linking Richard Sprague to 'Pratko.' "

The Inquirer learned earlier Saturday that documents turned over by the Crime Commission to attorneys representing the troopers included a report written by state police Sgt. Matthew Hunt, who was attached to the commission.

Hunt's report detailed an interview with a telephone operator at the State Police Academy at Hershey. In that report, according to informed sources, the telephone operator volunteered "that 'Pratko' was Richard Sprague."

THE LEAD was subsequently abandoned, the Inquirer has been told.

Sprague, meanwhile, has called the report "an absolute absurdity. Whoever wrote the report should come out and say so publicly.

"My guess is that the lawyer cited the report during cross-examination as a way of showing the absurdity of the Crime Commission report," Sprague said.

Vangrossi, meanwhile, said Saturday that his questions at the court-martial were prompted by Hunt's report and a report made by Anthony Caldonetti, a trooper attached to the Crime Commission. He said he could not remember the date of the Caldonetti report, but said that it mentioned nothing about Sprague.

VANGROSSI described Hunt's report "as a smoke-screen for something. I just don't know what it is."

Asked if he had been personally acquainted with Richard Sprague, Vangrossi replied that Sprague had been pointed out to him "once at a supper club."

The three troopers have been accused of wiretapping the phones of fellow officers at the King of Prussia motel during the Crime Commission's probe of alleged Philadelphia police corruption.

Caldonetti, however, testified on Friday that Luchansky was not among three men he said he saw fleeing from the motel room where the illegal wiretaps allegedly were found.

The prosecution is considering the theory that four persons — the three defendants and an unnamed civilian — did the tapping.

March 27, 1973

Witness Ties Sprague To Mystery Figure in Trooper Wiretap Case

By HOWARD S. SHAPIRO

Inquirer Harrisburg Bureau

HERSHEY. — A key witness in the court-martial of three state troopers reluctantly linked First Assistant District Attorney Richard A. Sprague on Monday to the mysterious "Nicholas Pratko," a prominent alias in a wiretapping scandal.

Sgt. Matthew E. Hunt, commander of a state Crime Commission police unit investigating alleged police corruption in Philadelphia, told the court-martial board that a confidential informant "told me the name (Nicholas Pratko) was Dick Sprague, that he thought it was Dick Sprague."

An unmarked state police car registered to the Pratko alias was found at the George Washington Motor Lodge in King of Prussia last Nov. 28. Hunt's detail was headquartered at the motel, where their three trooper colleagues are charged with wiretapping the operation.

EARLIER Monday, Sgt. Paul Kury, a trooper who assigns vehicles with fictitious registrations to undercover agents, testified that the coupe was assigned to Cpl. Metro Kardash, one of the defendants.

Kardash's attorney, Paul C. Vangrossi, asked Hunt about the confidential informant's data over the objections of Maj.

Robert Rice, state police prosecutor, who charged that the information is hearsay.

Hunt refused to reveal the informant's name.

Vangrossi produced a police report, filed by Hunt last January, which apparently spelled out the informant's details.

SPRAGUE HAS vigorously denied any link to the name or the incident.

After the testimony, lawyers from both sides huddled with court martial board president Maj. William Grooms in a noisy "private" sidebar conference.

"Somebody in the city of Philadelphia is being maligned here by inference in a situation that is grossly unfair," Rice was heard to say.

"Whatever was in the report was in the report," replied Wallace Worth Jr., attorney for Lt. Stephen Luchansky, another defendant.

"Well," Rice insisted, "I'd like it for the record that I object vigorously."

"You're ashamed of your own (State Police) reports, then," charged Vangrossi, "because that's what was in the report."

March 31, 1973

Final Decision on Trooper Wiretap Now Rests With Police Commissioner

By HOWARD S. SHAPIRO

Inquirer Harrisburg Bureau

HERSHEY. — The outcome of the controversial wiretapping court-martial of three state policemen now depends solely on State Police Commissioner James D. Barger.

Both sides presented final arguments Friday morning and the three-man court-martial board, led by Maj. William Grooms, broke for lunch before going into private session to decide the guilt or innocence of the police officers.

But it is Barger who must make the final decision after reading the recommendations made by the board. By state police law, those recommendations will never become public.

Grooms said Barger "absolutely makes the final decision," and may choose to accept the court-martial board's recommendations or may reject all tribunal suggestions in the secret report. The board would arrive at recommendations sometime this weekend, Grooms predicted.

Because a court-martial is not a criminal proceeding, the most severe penalty would be expulsion of the troopers from the force.

The troopers — Lt. Stephen Luchansky and Cpls. Metro Kardash and Curtis Guyette — are accused of wiretapping phone lines used by 13 state policemen assigned to a state Crime Commission probe of Philadelphia police corruption.

Final arguments ended two weeks of charges and countercharges, with accusations of political overtones made by the defense at the final session.

Philadelphia's first assistant district attorney, Richard Sprague, also was mentioned during the court-martial.

Sgt. Matthew Hunt said Sprague allegedly had used an alias in the registration of an unmarked state police car linked to the bugging incident. Sgt. Hunt is commander of the wiretapped police unit.

The car appeared in the parking lot of the George Washington Motor Lodge, at King of Prussia, last Nov. 28. Hunt's unit was stationed at the motel, where the wiretapping had been discovered by a janitor the previous day.

Defense lawyers argued Friday that Guyette and Kardash registered under assumed names at the motel, but that no testimony or evidence charged the two with the installation of any wiretaps.

The Philadelphia Inquirer
April 1, 1973

Did Sprague Quash Homicide Case as Favor to Urella?

This story was written by Inquirer Staff Writer Kent Pollock following an extensive investigation by Inquirer Staff Writers Greg Walter and Pollock.

First Assistant-District Attorney Richard A. Sprague, whose name was linked last week to former State Police Commissioner Rocco P. Urella in a wiretapping controversy, once declined to prosecute Urella's son in a homicide case.

Urella's son and a LaSalle College classmate were involved in a 1963 fight that led to the beating death of a 48-year-old man, but Sprague recommended there be no prosecution despite objections by police.

The wiretapping controversy began last November when men working directly for Urella were seen fleeing a King of Prussia motel after wiretaps were discovered on State Crime Commission investigators' telephones.

At the time, the investigators were probing Philadelphia police corruption — an investigation that both Sprague and District Attorney Arlen Specter have severely opposed since its inception.

JUSTICE DEPARTMENT sources have told The Inquirer that it has been substantiated that Urella's men were keeping tabs on the commission's Philadelphia investigation and that Sprague kept "in constant touch" with Urella during that time.

Sprague's name was linked to Urella during court-martial proceedings against three men who worked for Urella. Sprague has publicly denied any connection with the wiretapping.

Sprague's involvement with Urella Sr. became evident four days after the wiretaps were discovered when, The Inquirer learned, Sprague spent an entire day in conference with Urella at Urella's Delaware County home.

Sprague recently categorized his relationship to Urella as "very close, exceedingly close."

An extensive Inquirer investigation into the Sprague-Urella relationship and the 1963 homicide revealed that:

A MIDNIGHT TELEPHONE call was placed by Urella to Sprague shortly after Urella learned of his son's involvement in the homicide. Hours later, Urella drove Sprague to the police department's homicide division where Sprague, as chief of homicide for the District Attorney's office, was partly responsible for deciding not to prosecute Rocco P. Urella Jr.

SPRAGUE ACQUIESCED to police demands to prosecute Urella's classmate, but asked a magistrate to drop the charges. Urella Jr. did participate in the fight, but was never charged with any crime.

THE VICTIM'S ROOMMATE told police he was being assaulted by Urella Jr.'s classmate when the fatal assault apparently took place. Nevertheless, Urella's classmate was arrested. The victim's roommate was present at the magistrate's hearing, but wasn't called to testify by Sprague.

THERE ARE DISCREPANCIES between Sprague's official report, which makes no mention of Urella Jr. even as a witness, and comments he made at the time.

* * *

The story begins unfolding at 10:30 P.M., Saturday, March 2, 1963. Here is the cast of characters:

ROCCO URELLA JR., 21, a pre-medical student at La-Salle College who lived off campus with his family. His father was then a captain in charge of the Reading State Police Barracks.

DONALD F. SCALESSA, 20, a classmate and buddy of Urella Jr. who lived on campus and is the son of a wealthy Washington, D.C. physician.

JOHN R. APPLEGATE, 48, a General Electric Company clerk and a patron at Charley's Bar, Broad and Clearview sts., which was near his home at Norfolk Manor Apartments, 1415 Clearview st.

FRANKLIN R. FUNK, 47, a former clergyman working for the Philadelphia Transportation Company and Applegate's roommate.

Urella Jr. and Scalessa, who was under age at the time, entered Charley's Bar at about 10:30 P.M., where they met Applegate at about 1:30 A.M.

An hour later, the three let the taproom and — at Applegate's suggestion — went to Applegate's apartment to meet some girls and have a drink, according to statements made to police by Urella Jr. and Scalessa at the time.

Applegate's family and Funk have told The Inquirer that Applegate was a heavy drinker. In fact, he had been intoxicated earlier in the evening and Funk had urged him not to go out again.

Once inside Applegate's apartment, a fight began and Applegate was killed. His death certificate classifies the death as a homicide caused by brain damage "due to blunt impact to head."

According to Sprague's official report, Applegate arrived home and asked Funk to "break out the whiskey bottle for some drinks."

HIS REPORT continues: "Funk refused to get any bottle and then asked the two men (Scallessa and Urella Jr.) to leave the apartment, whereupon one of the men struck Funk, knocking him to the floor and splitting his lip."

Sprague's report says Funk got up off the floor and both men fled with Funk chasing them to the outside hallway. When Funk returned, the report says, he found Applegate lying on the floor and believed Applegate was "sleeping off his drunk."

When Funk awoke at about 8 A.M., Sprague's report says, he found Applegate in the same position and he realized Applegate was dead, so police were summoned to the apartment.

Scalessa was arrested eight days later on a general charge of homicide. That same day, he was taken before Magistrate Louis Vignola, who discharged the case at Sprague's urging.

Sprague told Vignola, according to newspaper reports, that he had urged police not to arrest Scalessa because a prima facia case had not been established. Vignola agreed.

AFTER THE HEARING, Sprague told reporters that Scalessa had hit Applegate when Applegate made an improper

suggestion "under circumstances which gave the defendant the right to strike the deceased and protect himself."

Urella Jr. was not charged, Sprague told reporters, "because he did not strike anybody."

There is no mention of an improper suggestion by Applegate in Sprague's official report written at the time and still on file in the District Attorney's Office.

Further, Funk has told The Inquirer in a recent series of interviews that Scalessa was assaulting him (Funk) when Applegate was apparently assaulted.

Shortly after the trio arrived at the apartment, Funk related, Urella and Applegate went into the apartment's bedroom, where they remained until Urella and Scalessa fled.

Funk said Urella and Applegate might have gone into the bedroom to look for the liquor which was hidden. He wasn't certain, however.

Funk said it wasn't long after Urella and Applegate went into the bedroom that Scalessa jumped him (Funk) and began hitting and choking him, splitting Funk's lip in the process.

—Urella ran from the bedroom, Funk said, then Scalessa stopped hitting him and fled with Urella. Funk said he chased the two youths as they ran.

WHEN FUNK returned to the apartment, he said, Applegate was lying outside the bedroom door, apparently passed out. Funk called a friend of his and asked her what he should do.

The woman, who also knew Applegate, told Funk to just let Applegate sleep off his drunk.

The next morning, Funk found Applegate in the exact same position and he realized his roommate was dead. He called a physician who came to the apartment and pronounced Applegate dead and told Funk to call the police, which Funk did.

There is no mention of Funk's telephone calls to his woman friend or to the doctor who pronounced Applegate dead in Sprague's official report summarizing the case.

Funk was taken by police to the department's homicide division where he was questioned most of the day of March 3 and given a lie detector test to determine whether he assaulted Applegate.

At that time, Funk related his entire story and was then released by police.

SEVERAL DAYS later, Funk said, police visited him and showed him an artist's drawing of Urella Jr. which Funk identified as the man he saw going into the bedroom with Applegate before Applegate died.

Funk also said he was present during Scalessa's hearing and was willing to testify, but Sprague never called him to testify.

"It was over in ten minutes," Funk said. "I was shocked."

Funk said he couldn't understand why he didn't see Urella at the hearing. Not understanding what was happening, Funk said he questioned Detective Edward Brooks, who had investigated the case, why Scallessa had assaulted him (Funk) if he was busy assaulting Applegate.

"I tried to get information out of Brooks. I said 'For goodness sakes tell me why I was hit' and he said, 'because you came to John's (Applegate's) aid. I don't remember that at all," Funk said.

Funk said he was certain of his identification of Urella because Urella had light hair while Scalessa — the man he vividly remembers attacking him — had black hair.

A check of admission photographs at LaSalle College shows Urella with light hair and Scalessa with black hair.

Scalessa was interviewed at his Glenn Burnie, MD., home where he is currently a real estate broker.

Question: "Was Funk ever struck by anyone?"

Answer: "Yes, he was."

Question: "By you or by Rocco?"

Answer: "By both."

Question: "Both of you struck him, why?"

Answer: "Because he was, well, when I struck him he was being struck by Rocco."

This portion of Scalessa's interview contradicts Sprague's claim that Urella was not arrested because "he did not strike anybody."

The police report on the incident says that Scalessa struck Applegate on the left lower jaw. "He (Applegate) fell to the floor on one knee and his elbow," the report says.

Detective Brooks testified at the hearing that Applegate had been convicted of sodomy in 1953 and was awaiting trial at the time of his death on a 1960 charge of solicitation to commit sodomy.

His testimony tended to support Sprague's claim that there had been some sort of "improper suggestion" by Applegate.

A search of Philadelphia police records, state police records, records in New Jersey where Applegate once lived and Federal records did not turn up any evidence of Applegate's ever having been arrested on any charge.

Applegate's children were shocked when they read in the newspapers the allegations about their father's homosexuality. Applegate had been engaged to be married a few years prior to his death, according to his daughter.

FURTHER, CHARLEY'S BAR, according to a bartender who said he knew the taproom's history, has never been a hangout for homosexuals.

In a recent interview, Philadelphia Medical Examiner Dr. Marvin E. Aronson said Applegate's death was caused by "traumatic sub-arachnoid hemorrhage and contusion of brain stem due to blunt impact to head."

After reviewing photographs taken of Applegate's body, along with autopsy reports, Dr. Aronson said the terminology "blunt impact" could mean a fist or some other object.

"In this case, I will tell you, there are also some superficial lacerations in the area where this injury took place . . . it is possible that this was done with a fist, but it makes it not as likely," Dr. Aronson said.

The fatal injury, according to medical reports, was situated behind Applegate's left ear.

Scalessa told The Inquirer he had struck Applegate on the chin. At the time of his arrest, he told police the same thing.

During his Inquirer interview, Scalessa didn't relate anything about an argument over drinks being served by Funk.

"As soon as we got inside that door, we never had a drink, we never had anything, not a cigaret. Right away we were confronted with the homosexuality," Scalessa said.

He continued, "I said, 'Rocco, let's get out of here.' Funk said to me, 'No, I'm going to (commit a sex act) you first.' And I said, 'No, you're not' and I hit him and ran."

At a different point in the interview, Scalessa identified Applegate as the person who made the proposition.

Question: "Applegate made an advance at you verbally, or did he touch you?"

Answer: "In the apartment, verbally."

Question: "Did he (Applegate) seem to be like a homosexual?"

Answer: "No."

Question: "Did he touch you?"

Answer: "No."

Several days later, The Inquirer again interviewed Scalessa. It was suggested that Scalessa had not told the truth during the first interview.

Question: "It is quite clear that you didn't kill John Applegate . . ."

Answer: "Well, I know that."

Question: "Why did you say you did?"

Answer: "I didn't."

Scalessa refused to answer further questions after being asked why he allowed himself to be blamed for a serious crime he did not commit. Earlier, he had told The Inquirer:

"I don't like delving back into it. It was something that happened years ago and I don't like thinking about it, let alone talking about it. It has no pleasantries at all. It's a disgusting thing and I don't really like to talk about it."

None of the other people involved, except for Funk, would comment on the case for The Inquirer.

Urella Jr. was reached by telephone in Bologna, Italy, where he is currently attending the University of Bologna Medical School.

"I have no comment . . . no comment whatsoever," said Urella Jr.

Urella was told that Scalessa had said he did not kill Applegate.

"I have no comment," he said, then hung up.

Urella Sr. said, "This thing is ten years ago and it's ridiculous to even talk about it . . . Mr. Sprague is a friend of mine and we've been professional friends for many, many years. I'm not going to get specific about any questions you're putting to me."

HE CONTINUED, "My son? Well, of course . . . he didn't strike anybody. He was down there and . . . it's all going back ten years . . . I know this much, my son wasn't involved and he wasn't charged with anything and he took a lie detector test to see if he was telling the truth as a witness and it showed he was."

There is no notation of Urella taking a lie detector test on the police department's summary of the case. Neither is there a notation of Funk taking such a test.

Homicide Capt. Arthur Matthews was questioned about the existence of lie detector test results and replied, "This (the summary) is all that is available."

Repeated attempts to interview Sprague were unsuccessful. On several occasions in correspondence to Inquirer Executive Editor Eugene Roberts, Sprague expressed a willingness to answer questions about the Applegate case.

But, nevertheless, he refused to be interviewed.

In one letter to Roberts, Sprague said, "There is nothing in the least improper that occurred in the handling of the Applegate case, and I would be happy to have that case reviewed by any impartial, independent individual."

ACTIVITIES SURROUNDING Applegate's homicide, documented by The Inquirer, indicate considerable involvement by Sprague as the District Attorney's Office chief of homicide, although he was the close personal friend of one of the suspect's father.

Scalessa's La Salle College classmates have told The Inquirer that Scalessa was "shocked" when he learned of Applegate's death from a newspaper account.

An article in the March 4, 1963, Philadelphia Inquirer was shown to Scalessa by a classmate because Scalessa had been bragging earlier that day about how he and Urella had beaten up a couple of men.

Scalessa called Urella, he told The Inquirer, then went to Urella's home where he discussed the situation with Urella Jr. and his father.

AT 12:55 A.M. ON MARCH 5, 1963 – several hours after Urella Sr. first learned of his son's involvement in the homicide – Urella Sr. placed a call to Sprague's home.

Sprague was not in, but Urella left a message with Sprague's wife that it was important for Sprague to get in touch with him.

A private detective had been hired by Sprague's wife at the time to trace her husband's movements. The detective's report was later used in connection with a divorce proceeding brought by Sprague that is still pending.

The private detective reported that Sprague returned to his home shortly before 4 A.M. on March 5, 1963.

Later in the day, Sprague's wife asked him about the call from Urella because, she told The Inquirer, the Urellas had been friends for a number of years and she was concerned.

Sprague told his wife that Urella's son and another . . . were involved in the killing of a center city man.

"I asked Dick (Sprague) what he had done. He said everything was 'taken care of,' " Mrs. Sprague said.

IT WASN'T LONG after Sprague had made the comment to his wife that Urella picked him up to go, Sprague told his wife, "to homicide."

Mrs. Sprague not only recalls the incident, but she kept detailed notes about it in a diary that she has shown The Inquirer to document her story.

This story has also been confirmed by another Inquirer source close to the Urella family.

A series of meetings followed between Sprague and police, according to what Sprague told newspapers at the time.

During one of the meetings, Sprague reported at the time, "The police department decided to arrest one boy (Scalessa). The DA's Office recommended there be no arrests, but the police department decided to go ahead."

Subsequent to the homicide, Sprague boasted to at least one of his friends that he "could get anything I want from Rocco

Urella," according to a sworn statement by the friend obtained by The Inquirer.

THE SWORN STATEMENT also alleges that Sprague on several occasions was driven to a Pennsylvania resort area in Urella's state police vehicle by Trooper James McCann, Urella's state police driver.

McCann was recently suspended by Urella's successor, Commissioner James Barger, as a result of an investigation stemming from the intimidation of a witness in the wiretapping controversy.

Sprague and Urella's law enforcement careers have crossed paths many times since the 1963 homicide.

It was Sprague who was sent in 1971 to Delaware County as a special Crime Commission investigator to look into corruption shortly after Urella left his post there as chief of the county detectives.

MEANWHILE, John Applegate's family and his former roommate wonder why nobody was held accountable for his death.

John Applegate is now just a morgue number, along with thousands of others in the city's archives.

But his death — along, with the apparently untrue accusation that he had a record as a homosexual — was an extremely personal tragedy to his family.

"After I read about it," his daughter recently told The Inquirer, "I called up the man who put the stone on my father's grave and I asked him to add one more line:

"Rest in Peace."

'Leaked' Wiretap Data, Trooper Admits

April 2, 1973

By KENT POLLOCK And
GREG WALTER

Of The Inquirer Staff

A state trooper assigned last year to the State Crime Commission's Philadelphia police corruption probe has admitted in a sworn statement that he leaked confidential information about the investigation to men working for former State Police Commissioner Rocco P. Urella, The Inquirer has learned.

At the same time, state police sources say, a receptionist in Urella's office has given sworn testimony before the crime commission that Philadelphia First Assistant District Attorney Richard A. Sprague kept "in constant touch" with Urella.

erred in an extensive investigation into the illegal wiretapping of telephones used by commission investigators at a King of Prussia motel.

ALL FIVE MEMBERS of Urella's so-called "palace guard" have been suspended as a result of the wiretapping probe. Three of the men last week were defendants in a court-martial proceeding stemming from the incident.

The receptionist in Urella's office has given secret testimony that reveals that Sprague constantly called Urella for months prior to the wiretaps' discovery.

The receptionist's testimony has been turned over to state police investigators to help them piece together the entire story surrounding the wiretapping of crime commission telephones at the George Washington Motor Lodge.

SPRAGUE AND DISTRICT ATTORNEY Arlen Specter have publicly denounced the crime commission's investigation as being unnecessary. Philadelphia police foiled crime commission plans to set up surveillance on possible corruption activities.

In one celebrated case, a trooper working for the crime commission was arrested for pinching a waitress in a center city

bar. The charges of assault, filed by the police, were later dropped by Specter.

A high state police source close to the investigation has told The Inquirer that Trooper Gerald T. DeWalt, who refused last week to answer questions during the court martial hearing, has given a sworn statement admitting his part in an elaborate effort to counter the crime commission's effectiveness.

DeWALT HAS, among other things, admitted tipping off Urella's men — in a clandestine way — that the wiretaps on crime commission telephones had been discovered.

DeWalt also admitted in his statement that Cpl. Metro Kardash, one of the three troopers facing court martial, had asked him many questions about the commission's activities, including what motel rooms were being used by commission investigators.

Three room numbers were given to Kardash by DeWalt, the trooper's sworn statement says. They were the rooms of supervisors Sgt. Matt Hunt and Cpl. Charles Todd, along with the room number of the investigators' "report room" from which information was telephoned to commission headquarters in St. Davids.

The telephones in these three rooms later were found to be wiretapped.

THE SCHEME to tip off Urella's men that the wiretaps had been discovered began at about 11 A.M. last Nov. 28, shortly after DeWalt learned that the wiretaps had been discovered, according to his statement.

He said he called his wife . . . and told her to call Mrs. Marion Gobrecht, operator of the Sentinel Motel on Route 202, and tell her that the wiretaps had been discovered.

Urella is half-owner of the motel with Mrs. Gobrecht, according to the recorder of deeds office in Chester County courthouse.

Mrs. Gobrecht then called Urella in Harrisburg, but he was not in. She left an urgent message for him to call back. . . .

The receptionist has told the crime commission that Urella returned to his office running, something she had never seen him do before.

Telephone company records subpoenaed by the crime commission show long-distance telephone calls that support DeWalt's admissions. They also show contact between DeWalt and Kardash for a long time.

According to a commission memorandum detailing the crime commission's investigation, Urella has admitted receiving a telephone call for Mrs. Gobrecht. He told investigators, the memorandum says, that the telephone call was in reference to a bomb threat at the motel.

SHORTLY AFTER URELLA received the call from Mrs. Gobrecht, according to the commission memorandum, three separate telephone calls were made in the motel room where Urella's men were [allegedly intercepting] commission telephone calls.

The callers, according to commission testimony by the motel operator, told Urella's men to get out of the room.

It was then that three men were seen fleeing the room. They were chased, but not caught, by commission investigators. They were recognized as Urella's men, however, according to the memorandum.

* * *

URELLA THEN DROVE at 80 miles an hour down the Pennsylvania Turnpike to meet the alleged wiretappers behind a huge cinder pile on Route 202 near turnpike exit 23, according to allegations in the prosecution memorandum.

Urella told crime commission investigators that Nicholas Pratko was the code name for Kardash.

A crime commission investigator testified during the court martial, however, that he had been told by a reliable informant that Pratko was a code name used by Sprague.

THE INFORMATION was contained in raw crime commission reports that were obtained and introduced at the court-martial by defense attorneys.

* * *

RICHARD A. SPRAGUE	:	COURT OF
v.	:	COMMON PLEAS
GREG WALTER	:	
KENT POLLOCK	:	APRIL TERM, 1973
HOWARD SHAPIRO	:	
EUGENE L. ROBERTS, JR.	:	NO. 3644
CREED C. BLACK	:	
MICHAEL PAKENHAM	:	
AARON EPSTEIN	:	
and	:	
PHILADELPHIA	:	
NEWSPAPERS,	:	
INC.	:	
and	:	
KNIGHT NEWSPAPERS,	:	
INC.		

OPINION

This is a defamation case brought by Richard A. Sprague against Philadelphia Newspapers, Inc. for publishing a series of articles in the Philadelphia Inquirer in late March and early April 1973. After a trial of approximately eight weeks the jury returned a verdict in favor of the plaintiff for $1.5 million dollars in compensatory damages and three million dollars in punative damages.

It is of course, difficult to summarize the testimony in a trial of this length but according to the contention of counsel for the plaintiff, which was apparently accepted by the jury, the articles commenced when the Inquirer hired one Greg Walter. He had been convicted of criminal wiretapping in the Philadelphia Municipal Court in September 1972. The prosecutor was Richard A. Sprague. At that time he was working for the Bulletin and after he was fired he was hired by the Inquirer in December 1972.

There was evidence that he called Sprague various derogatory names and that he was "out to get" Sprague.

The first-article appeared on March 25, 1973, in an article in the Sunday edition of the *Inquirer* entitled, "Ex-Official Denies Report Linking Sprague to 'Pratko' ". Plaintiff's Exhibit No. 1-D. The article purported to give the real identity of one "Nicholas Pratko", said to be a "code name for a State Trooper involved in wiretapping of the Pennsylvania Crime Commission". In the headline and body of the article, authored by Walter, the *Inquirer* directly connected the name "Pratko" to Mr. Sprague, raising the suspicion that Sprague was a "wiretapper" engaged in illegal activity. There was no previous article or any publicity to which the so-called "denial" was being made. By its own January 7, 1973 article, "Despite Denial Urella Had Wiretapping Evidence" authored by Walter and Pollock (Plaintiff's Exhibit No. 133), it is clear that they already knew that "Pratko was the undercover name of Metro Kardash a Pennsylvania State Trooper who was court martialed in the alleged incident. Eight days earlier, on March 17, 1973, another newspaper had identified Pratko as Kardash. Plaintiff's Exhibit No. 130.

The story was kept alive two days later, Tuesday, March 27, 1973, in an article by Howard F. Shapiro, an Inquirer reporter, entitled, "Witness Ties Sprague to Mystery Figure in Trooper Wiretap Case." The article created the impression of a link between the "mysterious figure" Pratko and Sprague. According to the article "Sergeant Matthew E. Hunt, Commander of a State Crime Commission police unit investigating alleged police corruption in Philadelphia, told the court martial board that a confidential informant 'told me the name (Nicholas Pratko) was Dick Sprague, that he thought it was Dick Sprague.' The article perpetuated the notion advanced originally by Walter, which, in Walter's own words: "made Mr. Sprague look like he was operating under you know, kind of false pretenses, using phony names to make contacts with Urella and so forth." Tr. 5/25/83 at 1043.

The next article was four days later with the headline: "Final Decision on Trooper Wiretap Now Rests with Police Commissioner." The article states:

> Philadelphia's First Assistant District Attorney, Richard Sprague also was mentioned during the court-martial.
>
> Sgt. Matthew Hunt said Sprague allegedly had used an alias in the registration of an unmarked State Police car linked to the bugging incident.

Sergeant Hunt was Commander of the wiretapping unit. The quoted portions of the March 31, 1973 article had nothing to do with the topic of the article, which dealt with the final decision making authority of then State Police Commissioner James E. Barger in the wiretapping court-martial of the state troopers accused of wrongdoing, among whom was Kardash, was one. The article had been changed from the original "hard copy" (typewritten copy by the reporter, Howard Shapiro), which originally read:

> Indeed, even Philadelphia's Richard Sprague, First Assistant District Attorney, was mentioned in hearsay evidence. Sgt. Matthew Hunt, Commander of the wiretapped police unit, linked Sprague's name to an alias who allegedly is registered to the unmarked state police car used in the bugging incident.

The fact of the matter was that Sprague was not Pratko and the Inquirer, relied upon the cross-examination of Sergeant Hunt at the court-martial hearing where he testified that a telephone operator told him that she believed that a person who was telephoning then Commissioner Urella was Pratko, and perhaps she believed that Pratko was Sprague. Hunt later said "Needless to say, the entire situation surrounding Mr. Sprague has been taken completely out of context since then, and I am therefore, forwarding this report to you. And I might add that, contrary to published reports, there has never been a report submitted to the Pennsylvania Crime Commission, by any member of the State Police detail, including myself, which alluded to any connection between Mr. Sprague and Nicholas

Pratko." (P-1f) (Memo from Sergeant Matthew E. Hunt, Pennsylvania State Police). (Tr. 5/25/83, 963). At this trial, Hunt testified that he discounted what the operator had told him, and that he didn't put any substance to that at all. (Tr. 5/25/83, 955-56). No one from the *Inquirer* ever contacted Sergeant Hunt. (Tr. 6/17/83, 39).

The next series of articles involving the Plaintiff began on April 1, 1973, in the Sunday edition of the Inquirer, with a front page story: "Did Sprague Quash Homicide Case as Favor to Urella?'. It carried with it a full page heading on page 14 entitled, "Sprague, Urella Tied to Wiretap, Homicide Cases."[1] (P-1k). The March defamations had already linked Sprague to illegal wiretapping. This article asserted a new "link" in the wiretapping controversy, this time between Sprague and Rocco P. Urella, Sr. (Urella Sr.) It then at least indicated a linkage between Sprague and Urella, and subtly if not directly, accused Sprague of improper, unprofessional, and illegal conduct, and a corresponding lack of integrity, in his quashing of a homicide investigation *ten years earlier* when Sprague was Chief of Homicide for the District Attorney's Office. *Id.*

Walter began his investigation of the Applegate matter in early 1973 and after approximately a three month investigation he and a reporter named Pollock telegraphed Sprague on March 14, 1973 in Erie and demanded answers to twelve questions involving this ten year old case before noon of March 16, 1973 and stated that if they did not have answers they would report that Sprague had no comment.

A series of letters between Sprague and the Inquirer ensued in which Sprague pointed out to the Inquirer the fact that he had prosecuted Walter and that the case was ten years old and that he needed time to refresh his recollection of the case.

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1. An oral argument was made by the defendant that the Court should have divided the submission of the case to the jury into the Pratko and Applegate articles, but since this headline coupled the articles, the Court did not do so.

Finally, as stated above, the article appeared in the Sunday edition with the headline "Did Sprague Quash Homicide Case as a Favor to Urella?". A large portion of the trial was devoted to the proof of the inaccuracies in the article regarding the evidence available concerning the "Applegate" death and Sprague's part in the investigation and the quashing of the charges against the son of Urella.

For the purpose of this opinion, it is unnecessary to detail these inaccuracies and the details of death of "Applegate". Suffice it to say, that when the article was compared with the evidence that Walter and Pollack had at hand, the jury could have found that the purpose of these misstatements and distortions was to make it appear that Sprague did not prosecute because the son of a man who was a friend of his was involved and that the reporters knew they were distortions or recklessly disregarded the evidence to make it appear that a clear case of homicide was not prosecuted.

The defendant in its brief raises the following questions:

1. The verdict was against the evidence.

2. The verdict was excessive.

3. Numerous errors of law were committed in the charge.

4. Numerous evidentiary rulings were erroneous.

5. The Court erred in giving an adverse interest charge relating to Walter.

6. The Court's ruling with respect to confidential sources was erroneous.

The first four of these reasons do not need any extensive discussion. They are of no merit.

The argument that the verdict was against the evidence has been amply answered in the statement of the facts. (This argument is coupled in defendant's brief with the argument for judgment n.o.v.). Both arguments are rejected. The Court ruled that Sprague was a public figure and was well aware throughout

the trial of the heavy burden placed upon public figures by N.Y. Times v. Sullivan, 376 U.S. 254 (1964). The evidence was ample to submit to the jury and should not on these grounds be disturbed.

The argument that the verdict was excessive is, of course, almost always the argument of a disappointed defendant and it is a particularly difficult argument to answer when the verdict is in the millions of dollars. It also is an argument where the appellate decisions are of little or no assistance since every case has a multitude of ramifications. Particularly, is this so in a libel case. On the one hand there is the argument that huge verdicts will place a newspaper in a position where it will hesitate to publish legitimate public criticism for fear that it will be held responsible in a huge verdict for libel. See New York Times v. Sullivan, 376 U.S. at 278. Speiser v. Randall 357 U.S. 513, 526 (1958). On the other hand, there is the argument that these verdicts will cause newspapers to be careful in what they do publish as they should be, and also, that a man's reputation is the most precious asset that he has and any malicious damage to it is inestimable.[2]

While it is true, as defendant points out, that plaintiff proved no monetary loss and while it is true that plaintiff was not subject to any disciplinary procedure, it is also true that the article could well be construed as accusations of malfeasance of misfeasance in office — quashing a homicide indictment for the son of a friend without cause where a clear case existed against the son. Under such circumstances, the jury verdict, under present day circumstances is not shocking and this Court will not interfere.

Defendant makes one further argument with respect to the punitive damages. It alleges that under the decisions of the United States Supreme Court punitive damages are unconstitutional. We do not read the decisions of the Supreme Court in this manner.

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2. "A good reputation is more valuable than money. Publilus Syrus Maxim 108 "Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial." Othello Act II, III 264

In Curtis Publishing v. Butts, 388 U.S. 130, 159-61 (1967), the Court affirmed a substantial punitive damage award for libel stating:

> [P]ublishers like Curtis engaged in a wide variety of activities which may lead to tort suits where punitive damages are a possibility. To exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee . . . *punitive damages serve a wholly legitimate purpose in the protection of individual rights.*

Following *Curtis,* in *Branzburg v. Hayes,* 408 U.S. 665, 683 (1972) the Court stated:

> The prevailing view is that the press in not free to publish with impunity everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, *including punitive damages,* or even criminal prosecution.

Most recently, in *Herbert v. Lando,* 441 US 153, 162 Pa. (1979), the Supreme Court stated: "*Gertz v. Robert Welch, Inc., supra.* 418 U.S. 350, 94 S. Ct. at 3012, limited the entitlement to *punitive damages,* but such damages are still awardable upon a showing of knowing of reckless falsehood," (Emphasis added).

Since we are faced with such language, we are of the opinion that it would be presumptuous to decide that punitive damages are unconstitutional.

I. THE CHARGE OF THE COURT TO THE JURY

The defendant's argument is captioned "Numerous errors of law were committed in the charge to the jury." Defendant breaks these down into five headings.

We have examined the charge in its entirety and find no prejudicial error. It is true that the charge did not include some of the points submitted by the defendant but it equally rejected

many submitted by the plaintiff. On the whole, it was fair and a review of the five headings and their subdivisions reveals no error.

In point of fact, several of the criticisms of the charge are belied by the record. One example will suffice. In point three, the defendant argues that the Court failed to charge that the publication must be defamatory to the plaintiff. Nothing could be further from the fact.

The Court said:

> "So you have the question of were these articles defamatory? That should be the first question you will ask."
>
> "This case is known broadly as a defamation case or a libel case, and it is governed by certain principles of law."
>
> ". . . the basic issues are the communications and the articles that were in the newspapers, and were they defamatory?
>
> Now, in deciding whether they were defamatory, the articles must be read as a whole. You must give the articles the interpretation that the words used actually bear. You may not change the language, or give it a meaning not expressed in actual use. Words must be given their ordinary meaning, and must be considered in the context of the entire article. You may not pick out and isolate the particular word or phrase, and determine whether, considered alone, they are defamatory."
>
> "Now, what kind of a communication is defamatory? A communication is defamatory of a person if it tends to harm the reputation of that person as to lower him to the estimation of the community or to deter third persons from associating with him. Words are not defamatory merely because they are annoying or embarrassing to the person to whom the communication referred."

Thus, defendant's argument, if we understand it correctly, comes down to the fact that the Court did not say that it must be defamatory and add *"to the plaintiff"*. Obviously, that is what

the case and argument was all about and obviously the jury understood that the defamation must be against the plaintiff. The argument has no merit whatsoever.

II. THE EVIDENTIARY RULINGS

The arguments of the defendant are as follows:

1. The Court refused to admit the Packel report. This report was clear hearsay. No statute makes it admissible and it was properly kept out of the evidence.

2. The Court refused to permit other articles from the N.Y. Times and the Bulletin into evidence as well as favorable publicity given by the Inquirer to the plaintiff.

These articles were deemed by the Court to be irrelevant. The issue here was whether the Inquirer articles were defamatory and not whether some other articles were also defamatory or contained praise of the plaintiff. In the exercise of discretion these articles were excluded and there was no error.

3. The plaintiff was permitted to testify that the Applegate article was entered into the Congressional Record.

The plain answer to this is there was no such testimony. In fact, the Court sustained an objection to the attempt by plaintiff to enter the excerpt from the Congressional Record into evidence (464) and the plaintiff did not testify that it was entered into the record but only that the Congressional Committee asked him about the wiretapping (Pratko) and the "fix". (Applegate).

4. The trial court erred in admitting into evidence a letter written about this lawsuit by Eugene L. Roberts, Jr., executive editor of *The Inquirer*.

This letter was clearly admissible for the purposes of cross-examination to test the credibility of Mr. Roberts. He had written it shortly before trial and it was not admitted as defendant now contends for the purpose of showing Mr. Roberts' state of mind at the time of publication of the articles but solely to test his recollection and in general his credibility.

We now come to the two issues which this Court considers the substantial issues in deciding the motion for a new trial.

Neither of these issues is without difficulty. The first is an issue of procedure and involves the question of when the adverse inference charge should be given and the second is an important question which may be of constitutional magnitude (either state or federal) and which has arisen in many different forms in recent criminal cases and in many civil libel cases. This second question, succinctly stated, is the right of a newspaper reporter to protect his sources.

III. THE CHARGE ON ADVERSE INFERENCE

There can be no doubt that Greg Walter was a key witness for the defense in this case who would ordinarily be called by the defendant. The case was continued once because of his unavailability and plaintiff's case centered around him as a reporter previously prosecuted by the plaintiff who was out to get him, who commenced the whole investigation of Sprague and the Pratko and Applegate incident and participated in most of such investigation. Indeed he was sued and by agreement, was dropped as a defendant but remained a defendant for evidentiary rulings. There can equally be no doubt that he finally appeared in the courtroom and therefore, was physically present, and in that sense available to both sides to call to the stand. He had also given a deposition which was not completed and plaintiff used portions of this deposition.

The real controversy over this witness centers not about his presence, but his physical condition and whether or not it was such that he could not physically withstand the tension of testifying in a courtroom.

The law on the question of whether or not the Court should give the adverse inference charge is not clear from the appellate decisions.

Former Chief Justice Horace Stern, in *Haas vs. Kasnot,* 371 Pa. 581-584 (1952), wrote:

> "The rule as stated by President Judge Rice, in *Wills vs. Hardcastle,* 19 Pa. Super. Ct. 525, 529, "Where evidence which would properly be part of a case, is within the control of the party whose interest it would naturally be to produce

> it, and without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him."

Clearly, the requisite factors enunciated in this rule justifying such an instruction are that the witness is in control of one party whose interest it would be to produce him, and failure by that party to explain why such testimony was not produced. In that precise case, the Chief Justice emphasized that the missing witness' testimony favored the defendant, whose very existence was denied by plaintiff, and whose address was solely within the knowledge of the defendant. Hence, it was reasoned that the failure of the defendant to satisfactorily explain his absence gave rise to the negative inference being used against the defendant.

In *Beers v. Muth,* 395 Pa. 624 (1959), the Court reversed where the lower court failed to give the adverse inference charge when a defendant (of course, a party) was not called to the stand even though the plaintiff had called him briefly on cross-examination.

In *Bentivogio vs. Ralston,* 447 Pa. 24-29-30 (1972), former Chief Justice Eagen reversed where the trial judge gave an adverse inference charge because a plaintiff had failed to call certain medical witnesses. In this opinion, he stated that in view of the fact that the names of the witnesses were revealed in depositions of plaintiff, and also in the plaintiff's testimony on the first day of a five-day trial, it was error to charge that the witnesses were peculiarly within plaintiff's control. The Chief Justice went on to say:

> "It is argues that the defendant should not be forced to assume the burden of having the physicians testify but that it is not the issue. The controlling point is that these witnesses were not peculiarly within the reach and knowledge of the plaintiff; hence, the plaintiff's failure to call them as witnesses did not give rise to an unfavorable inference."

Most recently, in *Bulman vs. Myers,* 467 A.2nd 1353, 1355, 1356 (1983), the Pennsylvania Superior Court sustained Judge

Takiff's refusal to give the adverse inference charge where the defendant failed to take the stand, but appeared in the courtroom from time to time, the Court there stated:

> "The appellants were free to subpoena the appellee to testify or call him as on cross-examination as an adverse witness when he was in the courtroom, or to introduce all of his pre-trial deposition. The appellant did not subpoena the appellee, nor call him as a witness while he was present, and only offered portions of his deposition testimony at trial. The appellee was equally available to both parties and was subject to service by the appellant. Therefore, under the circumstances of this case, we agree with the trial court that a jury instruction on negative inference was inappropriate."

Thus, absent the issue of the physical condition of Walters, the *Beers* case, supra. supports the giving of the charge where a *party* does not take the stand even though he was obviously available and even though he was called by the other party. In point of fact, since it was agreed that Walter was to be treated as a defendant this case clearly supports the charge even though Walter was available. However, in *Bulman v. Myers* supra, the charge was asked when a defendant did not take the stand and the the Superior Court affirmed the refusal of the adverse interest charge. Certainly, that case supports the defendant's position in this case.

Since, however, the *Beers* case is the latest Supreme Court case involving a party and the *Bulman* case is a Superior Court case, the Court is of the opinion that absent the issue of Walter's physical condition there was no error.

We now consider whether the issue of Walter's physical condition compels a different conclusion. Walter's physical condition was an issue throughout both the pre-trial phase and the trial of this case. The defendants contend that Walter's physical condition precluded his testimony and that the adverse inference charge was therefore, erroneous. The defendants further contend that *Farley v. SEPTA*, 279 Pa. Super. 570, 421

A.2d 346 (1980), requires any ruling on unavailability be made by the trial court and not by the jury.

In accord with its contention, defendants produced a letter from Walter's physician, Fred D. Holford, M.D. The letter, dated June 16, 1983, simply stated that Walter "... is presently recovering from coronary artery bypass surgery and it is medically inadvisable for him to testify before September 1, 1983." The defendants also offered to produce medical testimony regarding Walter's condition before the Court *in camera.* This offer of *in camera* testimony was refused by the Court. Defendants, for reasons best known to it, then refused to put the medical testimony on in open Court before the jury. In the absence of this testimony, all the Court had before it was the letter from Dr. Holford and evidence offered by plaintiff of articles written by Walter for the *Philadelphia Daily News* which showed that he was writing and traveling throughout the state at the time of trial. Under such circumstance there was no testimony before the Court for it to rule on the witnesses' physical condition, as there was in *Farley v. Septa,* supra. Defendants produced no authority requiring the testimony of Walter's physician be taken *in camera* and therefore, the Court's refusal to hear the testimony *in camera* cannot be considered an abuse of discretion.

We do not read *Farley* as requiring the Court to take the medical testimony regarding the ability of a witness to testify out of the hearing of the jury. We also do not read *Farley* as holding that in all instances the Court should decide the credibility of medical testimony on such issue. Rather we read *Farley* as saying that where the testimony is produced and it is uncontradicted and unimpeached as it was in *Farley,* the Court should rule. Our reading of *Farley* is reinforced by the following statement which carefully limited that case: (p. 351)

> "*Under the record in this case* "satisfactory" reasons for the failure of Plonski to testify are obvious and the jury should never have been instructed as to permissive inferences because of his failure to testify." (emphasis added)

In summary, the charge on the adverse inference was given and argued strenuously by counsel for the plaintiff. By no means can such charge or argument be held to be non-prejudicial. The charge was given because obviously this witness (actually, a party) was the alleged culprit and despite numerous discussions there was no competent evidence showing his physical inability to testify. Under such circumstances, we conclude there was no error.

IV. THE SHIELD LAW

The last and the most important issue can be termed the application of the Shield Law and whether or not the Court adopted the proper procedure in dealing with this question.

The Order in question reads as follows:

> "A question having arisen in this case of the applicability of the Pennsylvania Shield Law and the possible constitutional right of a newspaper to refuse to reveal its sources, the Court determines that in this case the Shield Law is inapplicable and that the defendants have no constitutional right to refuse to reveal its sources. Therefore, it is ordered that the defendant disclose its sources."
>
> "If the defendant chooses not to reveal their sources, it is precluded from defending this action on the grounds that the articles in suit, or any portion thereof, were based upon information received from a reliable, but undisclosed source."
>
> "In order to implement this Order, all evidence of what information defendants received from allegedly reliable, but undisclosed sources, shall be excluded. (Trial Transcript, June 13, 1983, pp. 58-59)."

The Statute in question provides (42 Pa. C.S.A.§5942):

> "No person engaged on, connected with, or employed by any newspaper of general circulation . . . for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any

information procured or obtained by such persons, in any legal proceeding, trial or investigation before any governmental unit."

Two provisions of the Constitution of the Commonwealth of Pennsylvania are also material.

Article 1 Section 7 provides:

"The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may speak, write and print on any subject, being responsible for the abuse of that liberty."

Article 1, Section II provides:

"All courts shall be open; and every man for injury done him in his reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Defendant's contention that there is a First Amendment privilege against disclosure of sources is not supported in any way by the cases or logic. This is not a case where the Court did not permit the defendant to speak freely. This is a case where the Court ruled that the defendant must speak or suffer appropriate sanctions. We perceive nothing in the first amendment which guarantees a reporter or anyone else the constitutional right to remain silent without consequences.

The clear-cut answer to this argument is found in *Taylor and Selby Appeals* 412 Pa. 32, 39 (1963) where the Supreme Court of Pennsylvania said:

"The language of each Constitution is clear, and by no stretch of language, can it protect or include under "freedom of the press", the non-disclosure of sources of information."

There is no doubt that the question is one of first impression in Pennsylvania. Because of its importance the Court excused the jury for a day, heard argument ruled and gave defendant

time to seek a ruling mid trial from the Supreme Court which refused to consider the issue on the merits at that time without prejudice to defendant's right to raise the issue as it has.

This Court has deeply ingrained respect for the rights of freedom of speech and press and recognized that throughout the existence of this country the exercise of this right has been responsible for correcting social abuses (civil rights), exposing public officers – even the President of the United States and is in the forefront of the fight to maintain a free society where ideas and issues can be discussed without fear of governmental intervention or even a dread of having to respond in damages for a simple mistake. But the Constitution and its interpretation has never rejected and never should reject the basic concept that an individual also has the right to live in dignity without fear that under the guise of the right to freedom of speech and press, the media will print or say a malicious falsehood about him with impunity.

It has therefore, been the function of the Courts to weigh the various competing rights of the media and the individual and make valued judgments which protect the media and at the same time honor the right of the individual to bring suit and recover damages for an injury to his reputation under carefully delinated conditions. Presented in this case with respect to this issue is one of those valued judgments.

As we have pointed out above, the case is one of first impression in this Commonwealth but it has been considered in other jurisdictions. In New York for example, in *Greenberg v. C.B.S. Inc.*, 419 N.Y.S.2d, 988, 996, 997 in considering this issue stated:

> "In short, defendants rely on undisclosed sources and information for verification and offer this verification as "proof" of their responsibility. Thus, they have put in issue the very privilege upon which they rely. They are using the "Shield Law" affirmatively as a sword to prevent challenge by the plaintiff."

(17) Such exploitation of the statute vitiates the limited right to recovery that the plaintiff has a private individual, and

should not be permitted (See *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A.2d 473). This purpose was not intended by the Legislature nor is such a use mandated by the First Amendment (see *Carey v. Hume* 160 U.S. App. D.C. 365,492 F.2d 631, pet. for cert, dsmd. 417 U.S. 938, 94 S.Ct. 2654, 41 L.Ed.2d 661, *Garland v. Torre*, 259 F.2d 545, cert. den. 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231). "A construction of the statute permitting the deprivation of a party's right of cross-examination on vital issues of his cause of action could create constitutional difficulty or informity."[3] (*Brogan*, supra. 22 N.J. at p. 154, 123 A.2d atp. 481). We must construe the statute to insure that its enforcement is enclosed by constitutional parameters. The solution to the dilemma on appeal is readily apparent. No consideration will be given to the defense of verification based on confidential material. The resolution of the trial problem is more difficult.

"Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances" (*Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635, 1648, 60 L.Ed.2d 115, supra). However, requiring the defendants to reveal what they seek to protect this case, would be unnecessarily damaging to the purposes of the statute. Nor do we deem their actions in asserting a defense of responsibility based on confidential sources and information a waiver, since the effect of a waiver would be unjustly harsh in view of the defendant's lack of awareness of the implications present in their assertion of a defense based on the confidentiality statute. Thus, the fair solution, one which does not attentuate the policy considerations of the statute, is to allow defendants to elect the future course of their defense. At trial, if the

3. We do not allude to the possible unconstitutionality of the statute as a violation of the doctrine of separation of powers (see People v. Monroe, 82 Misc. 2d 850, 370 NY S. 2d 1007; Ammerman v. Hubbard Broadcasting, 89 N.M. 307, 551 P.2d 1354 cert. den. 436 U.S. 906, 98 S.Ct. 2237, 56 L.Ed. 2d 404).

defendants opt to rely on their statutory privilege, they should be precluded from any use of those sources and information as proof of verification or evidence of responsibility. On the other hand, if they choose to fully disclose their investigation, no limitation of the defense will occur."

Thus, that Court not only reached the same conclusion that this Court reached but applied the same solution. It is to be noted also that this case did not involve a public figure with the heavy burden imposed by *N.Y. Times V. Sullivan, supra.* See pages 993 et seq.

On the other hand, New Jersey in considering the same question has held that its Shield Law affords an absolute privilege to newspersons not to reveal the source and that its Constitution does not create a constitutional right to maintain libel actions. *Maressa v. N.J. Monthly,* 445 A.2d 376 (1982).

This Court considered at the time of trial and now, on this motion these authorities, the principles of freedom of speech and press and the individuals right to damage for injury to his reputation. It decided that the right to freedom of speech and press would not be unduly hampered, if indeed affected at all, by requiring disclosure. However, in this case and in general, an individual would have his right to enforce his suit for defamation irreparably damaged if not extinguished by any holding which precluded him from obtaining information regarding the sources of the reporters.

The strong language in the Constitution of the Commonwealth of Pennsylvania not only compels the conclusion that we have reached but clearly distinguishes this case from *Maressa.*

Article I §II provides as quoted above that . . . "every man for an injury done to him in his lands, goods, person or *reputation* shall have a remedy by due course of law . . . (emphasis supplied)

This Court reads this portion of the constitution as creating a constitutional right for defamation and thus, creates a different situation from *Maressa.* Here there is a constitutionally protected right of defamation. (See also the comprehensive dissent of Judge Schreiber in *Maressa* supra.)

Moreover, any contrary ruling other than was made here would thwart the plaintiff in the heavy burden imposed on him by *N.Y. Times v. Sullivan, supra.* For a case involving privileges not to reveal and the first amendment, we invite attention to *Herbert v. Lando,* 441 U.S. 153. In that case the Court had before it the question of whether the first amendment precluded inquiry into the editorial process and state of mind of those who edit, produce or publish. The Court held that it did not and in the course of its opinion issued the following precepts:

> "Given the required proof, however, damage liability for defamation abridges neither freedom of speech nor freedom of press."

and again

> "But in the 15 years since *New York Times,* the doctrine announced by that case, which represented a major development and which was widely perceived as essentially protective of press freedoms, has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures. *Curtis Publishing Co. v. Butts,* 388 US 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967); *St. Amant v. Thompson,* 390 US 727, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968); *Gertz v. Robert Welch, Inc.,* 418 US 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974); *Time, Inc. v. Firestone,* 424 US 448, 47 L.Ed.2d 154, 96 S.Ct. 958 (1976). At the same time, however, the Court has reiterated its conviction — reflected in the laws of defamation of all of the States — that the individual's interest in his reputation is also a basic concern. *Id.,* at 455-457, 47 L.Ed.2d 154, 96 S.Ct. 958; *Gertz v. Robert Welch, Inc., supra,* at 348-349, 41 L.Ed.2d 789, 94 S.Ct. 2997.

and further

> ". . . evidentiary privileges in litigation are not favored,[24]

---

24. See Elkins v. United States, 364 US 206, 234, 4 L.Ed.2d 1669, 80 S.Ct. 1437 (1960) (Frankfurter, J., dissenting): "Limitations are properly

and even those rooted in the Constitution must give way in proper circumstances."

In addition to the above considerations of policy and precedent there is considerable doubt in the mind of the Court with respect to the question of whether Pennsylvania can constitutionally impose upon a "public figure" a statute which restricts his ability to prove a cause of action for defamation which since *N.Y. Times v. Sullivan* has been governed by federal law. In other words, once it has been established as was admitted in this case, that the plaintiff is a public figure with all the heavy burdens of proving a defamation case imposed by *N.Y. Times v. Sullivan*, can a state constitutionally impose by statute or otherwise, evidentiary limitations on his right to prove such a case.

After concluding that the defendant could not rely upon the Shield Law, the Court had to fashion a remedy when the defendant and its witnesses refused to reveal the sources. At no time did the Court consider or impose a contempt citation and despite plaintiff's vigorous attempts to get the Court to charge that the failure to reveal the source created a presumption of malice or a presumption that there was no source, the Court refused to go that far. Rather, the Court ruled that the defendant, if it chose not to reveal the source, all evidence from such source would be excluded. See *Oak Beach Inn, Corp. v. Babylon Beacon, Inc.*, Court of Appeals, State of N.Y. No. 76, May 10, 1984. Thus, the Court adopted a theory of granting no more relief for nondisclosure than was necessary to protect plaintiff's legitimate interests. Defendant contends that this ruling damaged its case and we have no doubt that it did, but it was the fairest remedy imaginable under the circumstances.

NOTES *(Continued)*

placed upon the operation of this general principle (of no testimonial privilege) only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." See also 8 J. Wigmore, Evidence §2192 (McNauthton rev. 1961); The Works of Jeremy Bentham 321 (J. Bowring ed 1843).

CONCLUSION

Finally, the Court would like to observe that this trial, over thirty-two days, involved knotty legal questions, and prior to trial numerous judges had either, on motion or *sua sponte*, disqualified themselves. This Court firmly believes in preserving the first amendment rights of the defendant and equally believes in the rights of an individual to be redressed for any defamatory matter where he has met the requirements of proof laid down in *N.Y. Times v. Sullivan*. We think the trial was fair and other than the question of the charge on the adverse inference and the handling of the Shield Law, we see no substantial prejudicial error. These two questions are troublesome and we invite an appellate review of them, so that if a new trial is necessary, we are given unequivocal guidance.

BY THE COURT:

_____

J.

CHARLES A. LORD

_____

J.

ARMAND DELLA PORTA

CURTIS C. CARSON, JR., Judge dissents.

DATED: March 22, 1985

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY CIVIL TRIAL DIVISION

RICHARD A. SPRAGUE	:	APRIL TERM, 1973
vs.		
GREG WALTER et al.	:	NO. 3644

DISSENTING OPINION

Carson, Jr., *J.*

I must respectfully dissent from my distinguished colleagues, as I am persuaded that the Trial Judge's rulings in two important aspects of this trial constituted reversible error.

The first error involved Greg Walter, defendant in this case, whose status as a defendant was waived by the plaintiff, except for evidentiary considerations. The witness, whose health limited his pre-trial deposition, was subpoenaed by plaintiff, and did in fact appear in court as a result thereof. Counsel for the defendant petitioned the Court to conduct a hearing outside the presence of the jury to determine whether the witness was medically capable of undergoing the rigors of trial examination. He produced a letter from the surgeon who had recently performed a second arterial coronary bypass, and in fact offered to produce the surgeon before the Court to substantiate the witness' medical unavailability. This offer was summarily rejected by the Trial Judge, who ruled that the medical testimony in support of the witness' unavailability must be presented initially to the jury.

In *Farley vs. Septa,* 421 Pa. 346, 350 (1980), Judge Watkins dealt with this precise problem, and in seemingly clear and unmistakable language, ruled contrary to the position taken by my colleagues. This opinion, on page 350, reads:

> "The most serious question raised in this appeal is the decision by the Court below to permit the jury to determine whether a proper excuse had been made for the

failure of the appellant to produce Pinoski, the bus driver, and his instructions to the jury, if they found the explanation was not satisfactory, an adverse inference could be drawn from his failure to testify . . .

The determination of whether the reasons advanced were satisfactory should have been made by the Court. It appears to be a similar decision to be made by the Court as the determination of competency of a minor, and if the Court held the excuse to be reasonable, the jury could not have been advised as to the inference."

Despite the clarity of the Court's language, my colleagues stated, in their opinion as follows:

"We do not read Farley as requiring the Court to take the medical testimony regarding the ability of a witness to testify out of the hearing of the jury. We also do not read Farley as holding that in all instances the Court should decide the credibility of medical testimony on such issue. Rather, we read Farley as saying that where the testimony is produced and it is uncontradicted and unimpeached as it was in Farley, the Court should rule."

The Trial Judge, in this writer's view, compounded the initial error by giving an adverse interest instruction upon defendant's failure to call Greg Walter. Plaintiff had, in fact, produced the witness by compulsory process, and had presented proof of his incomplete deposition which supports the fact that this witness was equally available to both parties, particularly since the Trial Court had refused to declare the witness unavailable. In just this precise situation, Judge Cirillo, in *Bulman vs. Myers*, 467 A2nd 1353, 1355 (1983), followed those cases that had previously held that an adverse inference instruction is not available to a party if the witness is equally available to both sides of the litigation.

Accordingly, the writer dissents from the majority, that a negative inference instruction was proper under the circumstances of this case.

Respectfully Submitted:

_____

J.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§5942. Confidential communications to news reporters

(a) **General rule.** – No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

(b) **Exception.** – The provisions of subsection (a) insofar as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 49 E.D. Appeal Docket 1987

RICHARD A. SPRAGUE,

Appellant

v.

GREG WALTER, KENT POLLOCK, HOWARD SHAPIRO, EUGENE L. ROBERTS, JR., CREED C. BLACK, MICHAEL PAKENHAM, AARON EPSTEIN, PHILADELPHIA NEWSPAPERS, INC., AND KNIGHT NEWSPAPERS, INC.

Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard A. Sprague, the appellant above-named, hereby appeals to the Supreme Court of the United States from the Judgment of the Pennsylvania Supreme Court dated May 31, 1988 and the Order of the Pennsylvania Supreme Court denying Reargument dated July 7, 1988.

This appeal is taken pursuant to 28 U.S.C. section 1257(2).

James E. Beasley
William P. Murphy

BEASLEY, CASEY, COLLERAN, ERBSTEIN, THISTLE, KLINE & MURPHY
21 South 12th Street, 5th floor
Philadelphia, PA 19107
(215) 665-1000

Counsel for Appellant

CERTIFICATE OF SERVICE

I, WILLIAM P. MURPHY, ESQUIRE, hereby certify that on July 26, 1988, the counsel listed below was served by First Class Mail, postage prepaid with a true and correct copy of Notice of Appeal to the Supreme Court of the United States.

Samuel Klein, Esquire
Kohn, Savett, Klein & Graf, P.C.
1101 Market Street, 24th floor
Philadelphia, PA 19107

_____

WILLIAM P. MURPHY

No. 88-671

FILED
NOV 23 1988
JOSEPH E. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD A. SPRAGUE,

Appellant

v.

GREG WALTER, KENT POLLOCK, HOWARD SHAPIRO, EUGENE L. ROBERTS, JR., CREED C. BLACK, MICHAEL PAKENHAM, AARON EPSTEIN, PHILADELPHIA NEWSPAPERS, INC., AND KNIGHT NEWSPAPERS, INC.,

Appellees

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

APPELLEES' MOTION TO DISMISS OR AFFIRM

Samuel E. Klein
(Counsel of Record)
Katherine Hatton
Kerry L. Adams
KOHN, SAVETT, KLEIN & GRAF, P.C.
1101 Market Street, 24th Floor
Philadelphia, PA 19107
(215) 238-1700
Counsel for Appellees

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Does the Court lack jurisdiction over this appeal where: a) the Pennsylvania Supreme Court did not pass on the federal question presented in the jurisdictional statement; and b) appellant failed to brief the federal question in the Pennsylvania Supreme Court and raised it belatedly in his application for reargument, which was summarily denied?

2. Does the Court lack jurisdiction, by appeal or by writ of certiorari, where there is no final judgment and the Pennsylvania Supreme Court remanded the proceedings for a new trial on two grounds, one of which involved a state law issue wholly unrelated to the federal question raised here?

3. Is plenary review of a due process claim unwarranted in a public official defamation suit where a state Shield Law is interpreted to allow a newsperson to refer to undisclosed sources?

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No. 88-671

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ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss this appeal on the ground that there is no jurisdiction under 28 U.S.C. §1257 because 1) the Pennsylvania Supreme Court did not address, and appellant did not properly present below, the federal due process question raised in the jurisdictional statement; and 2) there is no final judgment in this case, which has been remanded for a new trial. In the alternative, appellees move to dismiss or affirm the judgment below on the ground that the

question presented is so insubstantial that plenary review is unwarranted.

STATUTORY PROVISIONS INVOLVED

The jurisdictional issues raised by the motion to dismiss involve 28 U.S.C. §1257 (amended by Pub.L. No. 100-352, §3, 102 Stat. 662, effective Sept. 25, 1988), which provided, in pertinent part at the relevant time, that certain "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" may be reviewed by this Court and that such review may be "[b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity . . . ."

The Pennsylvania Shield Law involved in the underlying dispute, 42 Pa.C.S. §5942, provides, in pertinent part, as follows:

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

STATEMENT

Appellant Richard A. Sprague, then first assistant district attorney of Philadelphia, brought this defamation action based on a series of articles published in *The Philadelphia Inquirer*. Defendants were several reporters and editors of *The Inquirer*, as well as Philadelphia Newspapers, Inc., the publisher of the newspaper, and

its parent company (hereinafter collectively referred to as "PNI") (J.S. App. A-3-A-4).[1]

This case was tried before a jury in the Court of Common Pleas of Philadelphia County. The question of reporters' confidential sources first arose during pretrial discovery. The Pennsylvania Shield Law provides that newspersons shall not be "required to disclose the source of any information" in judicial proceedings. 42 Pa.C.S. §5942. Pursuant to a pretrial ruling on motion to compel production of documents, defendants produced all unpublished materials except those documents or portions thereof that referred to, or would tend to identify, a confidential news source (*see, e.g.*, R. 2960a-2998a, 3034a-3044a). PNI thus produced to Sprague its reporters' notes and files, including documents obtained from both disclosed and confidential sources, redacting only the names of confidential sources and identifying references (*see, e.g.*, J.S. App. A-47-A-50).

For example, PNI produced the reporters' transcription of a "prosecution memorandum," prepared by the Pennsylvania attorney general, which related to one of the challenged statements in the article in suit. Although the source who provided access to the prosecution memorandum was not disclosed, the reporters' transcription revealed to Sprague the content, the author and the recipient of the original document upon which the article in suit was partly based (*see* J.S. App. A-23).

The question of the scope of the Shield Law next arose during the defense portion of the trial, when a reporter referred to a confidential source for a particular piece of information (J.S. App. A-5). The trial court

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1. Philadelphia Newspapers, Inc. is a wholly owned subsidiary of Knight-Ridder, Inc., whose predecessor's (Knight Newspapers, Inc.) motion for nonsuit was granted at the close of Sprague's case. At the commencement of trial, Sprague dismissed the reporters and editors as defendants, although they were treated as parties for trial purposes (J.S. App. A-5 n.2).

entered an order holding the Shield Law "inapplicable" and directing PNI to "disclose its sources" (J.S. App. A-6). The court further ordered that if PNI did not reveal its sources "it is precluded from defending this action on the grounds that the articles in suit, or any portion thereof, were based upon information received" from an undisclosed source. Under the court's ruling, "all evidence of what information defendants received from allegedly reliable, but undisclosed sources, shall be excluded." (*Id.*). For example, PNI was not allowed to refer to the "prosecution memorandum," which had been produced during discovery, merely because Sprague was not told who provided PNI access to it (J.S. App. A-23).

After a $4.5 million jury verdict was returned in favor of Sprague, PNI appealed to the Pennsylvania Superior Court. That intermediate appellate court reversed the trial court's Shield Law ruling and ordered a new trial. The Superior Court held that the Shield Law did apply in this case, and interpreted that statute as precluding a trial court from " 'exacting' a penalty upon the defendant for its exercise of a statutory right . . . ." (J.S. App. A-29). In addition, the Superior Court held that a new trial was required, in any event, on a separate and independent state law ground unrelated to the Shield Law. That is, the trial court erred under state law by instructing the jury that it could draw an adverse inference from PNI's failure to call as a witness one of its employees, Greg Walter, who was equally available as a witness to Sprague (J.S. App. A-53-A-54).

As to the Shield Law issue, Sprague expressly argued to the intermediate appellate court that his federal due process rights would be violated by applying the statutory privilege to protect PNI's confidential sources (J.S. App. A-30). The Superior Court rejected his Fourteenth Amendment argument and accepted PNI's position that the proper course under the Shield Law was to allow reporters to refer to confidential

sources without identifying them. The reporters could then be cross-examined about all information they had prior to publication, and the jury would be free to believe or disbelieve their testimony concerning the existence and reliability of confidential sources (J.S. App. A-32).

Although he had briefed the federal due process argument in the Pennsylvania Superior Court, which rejected it, Sprague deleted that argument when he appealed to the state Supreme Court.[2] Accordingly, the Pennsylvania Supreme Court's opinion does not address due process under the Fourteenth Amendment.[3] Rather, that court upheld the Superior Court's grant of a new trial purely on state law grounds. In addition to remanding on the "adverse inference" question relating to Greg Walter (J.S. App. A-17 n.9), the Supreme Court was "constrained under the rules of statutory interpretation" to accept the Shield Law's "plain meaning" and to apply the statute in defamation proceedings to protect a media defendant from being forced to disclose its sources (J.S. App. A-10).

Citing its earlier rulings interpreting the Shield Law, the Pennsylvania Supreme Court stated that the

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2. Although Sprague's third "Question Presented" in his Pennsylvania Supreme Court brief was "whether the Shield Law is unconstitutional" (Brief for Appellant, p.2), that vague question referred to his argument based on reputational rights under the Pennsylvania Constitution (Brief for Appellant 35-36). The 47-page brief to the Pennsylvania Supreme Court makes no reference to the due process clause of the Fourteenth Amendment, or any cases interpreting that provision, although it makes passing reference to "due process," such as describing the trial court's ruling as preserving, *inter alia*, "due process" (*id.* at 28; *see id.* at 19, 32).

3. The only federal question the Pennsylvania Supreme Court addressed was whether the First Amendment "would require the creation of inferences in favor of the media defendant," *i.e.*, an inference as to an undisclosed source's reliability (J.S. App. A-13). The Court concluded that no such inference in favor of the media defendant was required by the First Amendment (J.S. App. A-13-A-15).

law reflects the "strong societal purpose in fostering uninhibited disclosure between individuals and the media." (J.S. App. A-11). Under the Court's interpretation of the Shield Law, a reporter's use of the privilege "does not foreclose the media defendant from introducing extrinsic evidence to establish the validity of the information or to demonstrate that they [sic] acted responsibly in the dissemination of the information." (J.S. App. A-12). By introducing such evidence, "the media defendant is not required to abandon its Shield Law privilege." (J.S. App. A-12).

Given its interpretation of the Shield Law, the Supreme Court concluded that the trial court's rulings ordering disclosure of confidential sources, and imposing sanctions for nondisclosure, required the grant of a new trial (J.S. App. A-15-A-16). The Court emphasized that, at the new trial, Sprague would be free to introduce evidence and otherwise challenge the reliability of the information PNI relied on and the credibility of its asserted sources (J.S. App. A-17).

In his application for reargument, Sprague for the first time briefed the federal due process argument to the Pennsylvania Supreme Court, arguing that the Superior Court's Shield Law ruling, now affirmed, effectively destroyed his opportunity to prove his defamation claim. The Court denied Sprague's rehearing request in a summary order, without explanation (J.S. App. A-1).

ARGUMENT

1. The Court Has No Appellate Jurisdiction Under 28 U.S.C. §1257(2) Because The Pennsylvania Supreme Court Did Not Address The Due Process Issue, Which Sprague Failed To Raise In A Proper Manner.

The basic requirement for appellate jurisdiction is lacking. The Pennsylvania Supreme Court did not reject a challenge to the state Shield Law "on the ground of its

being repugnant to the Constitution, treaties or laws of the United States," as required by 28 U.S.C. §1257(2).

Sprague is unable to show that the Pennsylvania Supreme Court passed upon the federal due process question he seeks to raise here.[4] Accordingly, there is no appellate jurisdiction in this Court. *E.g., Peralta v. Heights Medical Center, Inc.*, 485 U.S. ____, 99 L.Ed.2d 75, 80 n.4 (1988); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983).

As this Court has repeatedly stated, when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. at 181 n.3, quoting *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974), and *Street v. New York*, 394 U.S. 576, 582 (1969).

Appellant Sprague can make no such affirmative showing here. Rather, he states only that his Petition for Allowance of Appeal to the Pennsylvania Supreme Court raised the Fourteenth Amendment due process issue (J.S. 7). Raising the issue in the petition for discretionary appeal, however, is clearly not sufficient where, as here, Sprague then failed to argue the issue to the Pennsylvania Supreme Court in his brief on the merits. An issue raised in a lower Pennsylvania court is waived if it is not briefed or argued to the Pennsylvania Supreme Court. *See Harmon v. Chambers*, 358 Pa. 516, 522, 57 A.2d 842, 845 (1948), and cases cited therein.

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4. The jurisdictional statement cites only the Pennsylvania Supreme Court's statement that it granted review "because the issues herein implicate the relationship between the *federal and state constitutional provisions relating to free speech and reputation* and the statutorily created privilege conferred upon a media defendant, commonly known as the 'Shield Law.' " (J.S. 7, quoting J.S. App. A-3) (emphasis supplied). The state Supreme Court's opinion nowhere mentions due process.

Under Pennsylvania law, Sprague's attempt to address the federal process claim before the state Supreme Court for the first time in his application for reargument came too late. Under long-standing precedent, the Pennsylvania Supreme Court will not consider a Fourteenth Amendment claim presented to it for the first time on application for reargument. *In re: Dorrance's Estate,* 172 A. 900 (1933), *adhering to* 309 Pa. 151, 163 A. 303, *cert. denied,* 287 U.S. 660 (1932) and 288 U.S. 617 (1933).[5]

Under these circumstances, there is no appellate jurisdiction in this Court over the federal due process claim because there is no affirmative showing that the issue was decided by the court below. *See Exxon Corp. v. Eagerton,* 462 U.S. at 181 n.3; *Bailey v. Anderson,* 326 U.S. 203, 206-207 (1945). On the contrary, there is every indication that the Pennsylvania Supreme Court did not decide the due process issue appellant seeks to present here.

2. This Court Has No Jurisdiction, By Appeal Or Writ Of Certiorari, Under 28 U.S.C. §1257 Because There Is No "Final Judgment" In This Case, Which Has Been Remanded For A New Trial.

In any event, there is no jurisdiction in this Court for a second reason. There is no final judgment or decree by the Pennsylvania Supreme Court, as required for review on appeal, or by writ of certiorari, under 28 U.S.C. §1257. The Pennsylvania Supreme Court's ruling did

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5. Nor do the Pennsylvania rules of appellate procedure contemplate the grant of reargument when an appellant in that court has failed to brief an issue prior to the court's ruling. *See* Pa.R.A.P. 2543 and official note thereto. Reargument would have been particularly inappropriate under the Pennsylvania rules because Sprague had failed to give notice to the Pennsylvania attorney general, as required whenever a party "draws in question the constitutionality of any statute in any matter . . . ." Pa.R.A.P. 521(a).

not put an end to the litigation, but merely ordered a new trial. Under the general rule, such a remand for substantive proceedings means that the judgment is nonfinal and nonreviewable by this Court. *See San Diego Gas & Elec. Co. v. San Diego,* 450 U.S. 621, 632-33 (1981); *O'Dell v. Espinoza,* 456 U.S. 430 (1982); *Flynt v. Ohio,* 451 U.S. 619 (1981). Adherence to the finality rule is particularly appropriate here where: 1) a new trial is required on a state law ground that is wholly unrelated to the Shield Law question; and 2) the new trial will undoubtedly raise other federal questions, such as those related to the First Amendment.

This case does not fit within any of the four categories of cases described in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), in which sufficient "finality" will be found despite a remand for further proceedings. First, the federal due process issue is not conclusive, and the outcome of the new trial is not preordained. *See Cox Broadcasting,* 420 U.S. at 479. Under the ruling below, Sprague retains the opportunity to attempt to prove that PNI published a defamatory falsehood with knowledge of falsity or subjective awareness of probable falsity. The Pennsylvania Supreme Court expressly held that the plaintiff is free to introduce evidence and otherwise attempt to convince the jury of the non-existence and unreliability of information from confidential sources (J.S. App. A-17). While Sprague makes a theoretical argument that the application of the Shield Law devastates his chance to prove constitutional malice, there is no factual support for this assertion and an ultimate verdict in PNI's favor is certainly not a foregone conclusion.

Second, the federal due process issue will not necessarily survive and require decision regardless of the outcome of the new trial. *See Cox Broadcasting,* 420 U.S. at 480-81. On the contrary, Sprague could conceivably prevail under proper legal standards at the new

trial, in which case his argument of deprivation of due process rights would evaporate.

Third, later review of the federal issue will not be foreclosed in all events. *See Cox Broadcasting*, 420 U.S. at 481-82. If Sprague loses on remand, so that his due process claim does not become moot, he may still press that federal claim through the state courts and again present the issue to this Court. The possibility for later review in this Court exists even if the Pennsylvania Supreme Court should apply the "law of the case" doctrine and decline to hear the due process claim on the second appeal because of Sprague's previous waiver of that argument. *See, e.g., Mercer v. Theriot*, 377 U.S. 152, 153 (1964).

Finally, this case does not fit the fourth *Cox Broadcasting* category. Reversal of the state court on federal due process grounds would not preclude further litigation because a new trial is required, in any event, on the unrelated "adverse inference" ruling. Moreover, reversal on the due process issue would "merely control[]. . . the nature and character of, or determin[e] the admissibility of evidence in, the state proceedings still to come." *Cox Broadcasting*, 420 U.S. at 482-83. The Shield Law ruling below governs the admission of evidence and does not dictate the outcome.

In short, there is no "final" judgment or decree by the state court. Therefore, there is no jurisdiction, by appeal or writ of certiorari, in this Court.

3. There Is No Substantial Due Process Question Meriting Plenary Review Where A State Shield Law Is Interpreted To Allow A Newsperson To Refer To Undisclosed Confidential Sources In A Public Official Defamation Suit.

Sprague argues that the due process clause of the Fourteenth Amendment bars the use of Pennsylvania's Shield Law to protect the identities of confidential

sources in a public figure defamation trial at which a reporter refers to information obtained from undisclosed sources. Under Sprague's argument, this interpretation of the Shield Law effectively forecloses a finding of constitutional malice as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and thus deprives him of a fundamental right without due process. This is virtually the same due process argument that was rejected by the Third Circuit, and which this Court declined to hear, in *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 780 F.2d 340, 342 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1187 (1986).

As in *Coughlin*, full review of the due process issue in this case is unwarranted.[6] As this Court has recognized in the context of grand jury investigations, creation of evidentiary privileges for newspersons is a matter left to state law and state constitutions. "It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

Accordingly, in a much broader ruling than the decision below, the Third Circuit in *Coughlin* upheld the use of Pennsylvania's Shield Law to prevent discovery of all unpublished investigative documents, whether relating to confidential sources or not.[7] Without mentioning

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6. Appellant here challenges only the Shield Law, not the application of the *New York Times Co. v. Sullivan* constitutional malice principles. *Compare Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 476 U.S. at 1187-88 (Burger, C.J., dissenting). In its present posture, the instant case does not pose any constitutional malice issues, such as those to be reviewed in *Harte-Hanks Communications, Inc. v. Connaughton, cert. granted*, 57 U.S.L.W. 3280 (U.S. Oct. 18, 1988) (No. 88-10).

7. In *Coughlin*, the plaintiff was denied access to all unpublished documents, including reporters' notes and broadcast outtakes, and to general editorial processes. *See Coughlin*, 780 F.2d at 344 (Becker, J., concurring). The Pennsylvania Supreme Court has

any subsequent restriction on defendants' evidence at trial, the Court rejected an argument that the statutory privilege deprived a public official defamation plaintiff of federal due process rights. 780 F.2d at 342.

While the Pennsylvania Supreme Court did not address this issue, the intermediate appellate court correctly rejected the due process argument in the instant case (J.S. App. A-30-A-31). Whether viewed in terms of procedural or substantive due process, an evidentiary privilege for newspersons' confidential sources fully comports with Fourteenth Amendment rights of defamation plaintiffs.

First, the Shield Law withstands the balancing test for measuring procedural due process, as set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), even though the Pennsylvania Constitution creates a "property" interest in reputation. (*See Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 193, 532 A.2d 346, 350 (1987).)[8] The state's interest in the Shield Law outweighs the risk that a public official plaintiff will be erroneously deprived of a defamation recovery. Pennsylvania has struck a reasonable and appropriate balance between reputational rights and its interest in a free and uninhibited press. The Shield Law plays a vital role in furthering the state's interest in protecting the "stream of information flowing to reporters and then to the public" provided by confidential sources who are guaranteed protection even if libel litigation ensues. *Coughlin*, 780 F.2d at 352 (Becker, J., concurring). The libel

NOTES *(Continued)*

subsequently interpreted the Shield Law more narrowly to protect only the identities of confidential personal sources, not the discovery of documentary sources such as reporters' notes. *Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 195, 532 A.2d 346, 351 (1987). PNI produced its reporters' notes and files in the case, as subsequently required by *Hatchard*.

8. Federal rights do not make reputation alone a liberty or property interest protected by the due process clause. *See Paul v. Davis*, 424 U.S. 693, 711 (1976).

plaintiff, on the other hand, "is not denied his opportunity to bring his case to court and have it heard; victory, while not easy, is also not impossible." *Id.*

The fairness of the balance struck by the Pennsylvania legislature is readily demonstrated by the facts in this record. Sprague had and used at trial PNI's reporters' notes and files; only the names of, and identifying references to, confidential sources were redacted. Having the reporters' pre-publication files gave Sprague a fair chance to prove constitutional malice, if there was any, despite the nondisclosure of the identity of certain sources.

For example, the identity of the person who provided PNI access to the government prosecution memorandum (see pp. 3-4, *supra*) is irrelevant. Sprague had the transcribed memorandum itself, so he had the opportunity to cross-examine not only the reporters but also the memorandum's author and other witnesses as to the reliability of that document. This is but one example of the avenues open to Sprague in his attempt to prove publication with knowledge of falsity or awareness of probable falsity.

Sprague's argument that he is effectively foreclosed from proving constitutional malice, on the other hand, is entirely theoretical and certainly premature at this juncture. As the Pennsylvania Supreme Court was careful to explain, its ruling allows Sprague, at the new trial, to attempt to convince the jury of the inaccuracy of the information supplied and the unreliability of confidential sources. The libel plaintiff will thus rely on time-honored tests of credibility. For example, jurors may be hard-pressed to accept a reporter's "confidential source" testimony if the underlying information is inaccurate, the reporters' notes show conflicting information or the failure to verify, or if the information is inherently improbable. *See generally St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

Under the Pennsylvania Supreme Court's rule, in sum, the libel plaintiff retains a reasonable opportunity to challenge a reporter's reliance on undisclosed sources. The attack is simply limited to the information obtained and may not reach the reporter's sources themselves. This limitation of plaintiff's evidentiary weapons clearly does not amount to a denial of procedural due process.

Similarly, Sprague has no colorable substantive due process argument, based on alleged deprivation of his "right" to sue. As this Court has held in upholding a state's decision to bar completely a cause of action allegedly protected by the due process clause, "the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 181 (1980). Pennsylvania's Shield Law privilege is far from irrational because it so directly promotes the state's substantial interest in furthering the free flow of information.

Finally, Sprague has shown no conflict on the due process issue. In addition to the Third Circuit in *Coughlin*,[9] other courts have rejected constitutional due process challenges to newspapers' Shield Law privileges. *See Ex Parte Sparrow*, 14 F.R.D. 351, 353 (N.D. Ala. 1953); *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, 385, *cert. denied*, 459 U.S. 907 (1982). *See also Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243 (Ind. App. 1984) (Indiana Shield Law allowing full use of newsperson's privilege at trial held not violative of state due process rights).

On the other hand, Sprague is unable to show any court decision that strikes down a newsperson's Shield Law on due process grounds. While he cites two lower

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9. *See also Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 278-79 n.74 (3rd Cir. 1980).

court cases limiting the use of particular Shield Laws at trial, those decisions merely construe particular statutes on state law grounds and do not reach the due process issue. *See Laxalt v. McClatchy*, 116 F.R.D. 438, 452-53 (D. Nev. 1987); *Greenberg v. C.B.S.*, 69 A.D. 2d 693, 419 N.Y.S.2d 988, 996 (1979).[10]

In fact, Sprague cites no cases striking down any evidentiary privilege on due process grounds. On the contrary, in addition to newspersons' Shield Laws, other evidentiary privileges are routinely deemed to comport with due process requirements. *See, e.g., Samuelson v. Susen*, 576 F.2d 546, 553 (3rd Cir. 1978) (Ohio privilege for medical review proceedings); *Rosen v. N.L.R.B.*, 236 App. D.C. 298, 735 F.2d 564, 577 (D.C.Cir. 1984) (attorney-client privilege).

In summary, Sprague has failed to demonstrate any substantial due process issue justifying plenary review. Particularly at this stage of the proceedings, before a new trial implementing the Pennsylvania Supreme Court's Shield Law ruling, there is no due process claim warranting this Court's review.

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10. Similarly, the court did not limit the Pennsylvania Shield Law on due process grounds in *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523, 529 n.3 (E.D.N.Y. 1979). The court merely mentioned in dictum the option of limiting defendants' proof at trial, on state law grounds. Nor did the court address due process rights in *Kapiloff v. Dunn*, 27 Md. App. 514, 343 A.2d 251, 257 (1975), *cert. denied*, 426 U.S. 907 (1976). That case mentioned but did not pass on a lower court order, not based on a Shield Law, which limited a defendant's use of evidence from undisclosed sources.

CONCLUSION

For these reasons, appellees' motion to dismiss should be granted for lack of jurisdiction. In the alternative, the motion to dismiss or affirm should be granted for failure to present a substantial question of federal due process.

Respectfully submitted,

SAMUEL E. KLEIN
KATHERINE HATTON
KERRY L. ADAMS

KOHN, SAVETT, KLEIN & GRAF, P.C.
1101 Market Street, Suite 2400
Philadelphia, PA 19107
(215) 238-1700

Attorneys for Appellees

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